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WAR DAMAGE ACT, 1941.

By P. H. THOROLD ROGERS, Barrister-at-Law.

It is believed that the War Damage Act, 1941, has made Parliamentary history in more than one sense. It can be but seldom that an Act of such length—with its attendant schedules it occupies ninety-six pages in the official edition of the Statutes —has passed through Parliament in so short a time, and no measure of comparable importance has ever been so drastically and speedily altered as a result of the pressure of private members. The result is a statute which is breathtaking not only in its complexity and length but also in the revolutionary boldness of its provisions.

It will be obvious that it is quite impossible even to attempt properly to summarise the effect of so immense a measure in an article of this sort, and the author confesses to have experienced a feeling comparable only to one of terror when asked by the editor to undertake this task. The Herculean task before him is in itself some justification for asking for the consideration of his readers, but to this he has to add the further fact that his training for flying duties in the R.A.F. has taken him far away from reference libraries and books and has robbed him of all but very little time for study and research. In the present article he has tried to temper a desire to deal faithfully with the Act as a whole with the need at the same time to compress the subject-matter into a reasonable compass. Unless the commentary was to take the form

of a digest it would have been impossible to attain this objective; he has, therefore, deliberately sacrificed completeness in favour of the alternative course of discoursing at greater length on a number of points which in his humble opinion will be of importance to conveyancers and the profession in general, and it is hoped that all who read this article will be able to refer also to one or other of the commentaries upon the Act which have been published (*a*).

A word on the law as it was before the War Damage Act, 1941, is necessary to a proper appreciation of its effect. The measures in force at the beginning of 1941 were the Landlord and Tenant (War Damage) Act, 1939; the War Risks Insurance Act, 1939; the War Risks Insurance (Restriction on Advertisements) Act, 1939; and the Compensation (Defence) Act, 1939. Of these the last is of no importance in the present connection; it consists of a code for the compensation of the owners of requisitioned property, and deals only with war damage in so far as it is occasioned to property which has already been requisitioned. Both this Act and the Landlord and Tenant (War Damage) Act, 1939, have been discussed in the *Conveyancer* by the present author, and it is unnecessary to say anything more about their provisions than to draw attention to the very important modifications of the latter Act which are now contemplated in the Landlord and Tenant (War Damage) (Amendment) Bill, 1941, and which are designed to adjust its provisions to fit in with those of the War Damage Act. The War Risks Insurance Act, 1939, is more important in connection with the War Damage Act, 1941, for there are several places in which their respective provisions march upon each other. By Part I of the former Act the Board of Trade was empowered to embark upon the insurance and reinsurance of ships and their cargoes against King's enemy risks, thus relieving the ordinary market of a burden which had become too heavy for it to bear; and by Part II there was set up a scheme for the insurance of all persons carrying on business as sellers or suppliers of goods against the risks of war damage to their stock-in-trade of such goods. The limitations upon this scheme—it is called the commodity insurance scheme—were considerable. It was confined in its operation to the businesses of selling and supplying goods, and had no application

(*a*) We have received the following:—
War Damage Act, with an Introduction, Notes, Incorporated Enactments and Index, by the Hon. Dougall Meston (Sweet & Maxwell, Ltd.: 12s. 6d.).
Loose Leaf Encyclopedia of War Damage and Compensation, edited by John Burke (Hamish Hamilton (Law Books), Ltd.: £1). Besides the War Damage Act this includes the War Risks Insurance Act, Landlord and Tenant (War Damage) Act, Acts affecting Housing and Essential Business and Plant, Compensation Defence Act, the Rules and Orders made under the Acts, and Forms.

at all to any other business or to the professions. Even in its application to the favoured businesses it was of limited extent, for it covered only stock-in-trade, that is to say, goods held for sale or supply or held in order to be made up into goods for sale or supply. There was, therefore, no insurance of fittings, fixtures, machinery, etc. There was also no insurance of land or buildings, the Government of the day being too uncertain of the future to feel justified in putting forward any measures to deal with this problem whilst the War Risks Insurance (Restriction of Advertisement) Act, 1939, forbade the advertisement, but not, be it remarked, the actual conduct, of schemes of mutual insurance of the sort with which all readers of this article will have become familiar in the first two months of the war.

This inaction was a disappointment, coming as it did after the promises half held out in the Weir Report, and it is of the greatest credit to the present Government that they have allowed this promise to bear fruit in the form of a statute of breathtaking boldness.

Scheme of the Act.

The main purposes of the War Damage Act, 1941, are twofold, and may be very briefly summarised. The first is to provide for the payment out of public funds of compensation in respect of war damage to land or buildings, and the second is to establish a scheme for the insurance of such chattels as are not insurable under the commodity insurance scheme set up by the War Risks Insurance Act, 1939.

Neither of these aims can be achieved by brevity of draftsmanship, and in fact the Act consists of 102 sections and five schedules, and contains on almost every page the threat of more and yet more legislation to follow in the form of regulations or orders, some of which have already made their appearance. A word of warning may here be advanced to those who have read the earlier commentaries upon the Act published very soon after it received the Royal assent. Such of these commentaries as the author has seen contain many statements of fact which appear to be quite unjustified in law, and which upon investigation are found to be based upon Ministerial and other statements made in the course of the progress of the Bill through Parliament. The orders have in many instances departed from those statements and all such interpretations of the Act must now be received with the greatest caution.

It is proposed to treat here with that part of the Act—Part I—which deals with war damage to land. As its name implies, the

Act is not an insurance Act so far at least as realty is concerned. It is true that it started life as a Bill with the word "Insurance" incorporated into its title, but it was soon recognised that this would be a complete misnomer.

That it is not an insurance Act appears both from its nomenclature and the nature of its provisions, and also from a comparison with Part II, which deals with war damage to chattels in a manner which is true insurance.

The scheme of Part I is to pay to the owners of land or buildings which have suffered war damage compensation calculated not so much by reference to their loss as to the needs of the public as a whole. But for this purpose an enormous fund was required, and the Act partakes, therefore, of the nature of an insurance measure in so far as it contains detailed provisions for the payment by potential claimants of contributions towards a fund out of which compensation will eventually be payable.

The Act deals first with the payment of compensation, and relegates the problems of contribution to second place; but it is felt to be illogical to do so, more especially as the contributions become payable almost immediately, whereas the payment of compensation will usually be postponed until after the end of the war.

But before treating here of the contributions which have been levied upon property we may pause to remark that Part I of the Act will be administered by a statutory body called the War Damage Commission, under the chairmanship of Sir A. M. Trustram Eve, which is charged with the task of investigating claims and authorising payments, the collection of the contributions being in the hands of the Commissioners of Inland Revenue. In most instances the decision of the Commission will be final, but there will be an appeal to the High Court on points of law (the useful precedent set up in the Housing Acts of appointing a particular Judge to deal with all such cases is followed in section 94), and on certain questions of value there will be an appeal to a referee selected from a panel appointed for this purpose. Some problems of valuation and apportionment will be dealt with by the Commissioners of Inland Revenue, subject to a somewhat restricted right of appeal to the Special Commissioners.

Regarded very broadly, sections 18—47 inclusive impose a levy on the ownership of land which is unprecedented both in principle and amount in the history of taxation in this country. This levy, which we shall see is to be spread over a period of five years, is called a "contribution"—a euphemism for "tax". The properties in respect of which it will be payable are denominated

" contributory properties ", the value of the property upon which the amount of the contribution is calculated is called the " contributory value ", and the person liable to make the contributions the " direct contributor " (" direct " to distinguish him from the " indirect " contributor, who is required to contribute towards a contribution for which someone else is primarily liable).

Contributory Properties.

The net has been widely drawn and almost all properties will be contributory properties. A number of exceptions will be found in section 19, and there are also others. Of those in section 19 it may be observed that such purely incorporeal rights as a fishery (but not all fishing rights), a corn rent or any rent-charge are excepted, perhaps because they are incapable of sustaining damage; whilst of the other exceptions it must suffice here to note that property occupied mainly or exclusively for the purposes of a public undertaking (section 40) will pay no contributions *under this Act*, nor will properties occupied by undertakings of such a character that they are valued for rating purposes by reference to " receipts, profits or output " (section 40. These properties are to be separately dealt with in special legislation which is now in draft). Advertising sites are specially, and unsatisfactorily, dealt with in section 19, and in section 44 there are some difficult provisions as to requisitioned land. The effect of these seems to be that in assessing the value and determining the use to which land is put the fact that it has been requisitioned is to be disregarded and it is to be treated as if it was still being used for the purposes for which it was used before the requisition. It is not clear whether in the result the contributions will be payable by the Crown or by the dispossessed owner, but it is thought that on a proper construction of the relevant passage the former interpretation is the more correct (section 44).

The exceptions thus disposed of, it remains to point out that contributions will be payable by all properties which are either assessed for the purposes of Schedule A or which, although not so assessed, are the subject of a valuation for rating purposes (section 19).

Contributory Values.

The extent of the contribution payable will be determined by reference to the contributory value of the particular property, and this in its turn will be fixed by the assessment or rating valuation. But here a word of warning is necessary. Although, as will appear

later, contributions will continue to be payable for a period of five years, the cover (if the use of a convenient insurance term may be permitted) afforded is limited to a period defined in the Act as the "risk period" which commences on September 2, 1939, and ends on August 31, 1941.

The relevant assessment or valuation by which the contributory value will be fixed is that which was in force during the risk period. If this value is determined by reference to a Schedule A assessment the material assessment will be the first in force during the risk period (section 19); but if as a result of some alteration in the condition or area of the property this assessment was replaced by another during the risk period, the latter will be accepted as fixing the contributory value if, but only if, it is greater than that which it superseded (section 30). Where the rating valuation is the determinant figure, and there was more than one such valuation in force during the risk period, the earlier will in all cases be the material one (section 19).

This method of fixing the contributory value raises a number of points of great importance to prospective purchasers. In the first place it will be observed that as the risk period does not expire until August 31, 1941, any increase in the schedule assessment resulting from an alteration in the area or condition of the property will result in a proportionate increase of the contributions payable during the next four years. Secondly, it will not be sufficient to discover the current assessment, but all purchasers should satisfy themselves that there has been no other higher assessment in force during the risk period. We shall see later that the first instalment, which is payable on July 1, 1941, will in all cases be borne by the person who was the legal owner entitled to possession on January 1, 1941 (for the Act directs that the identity of a direct contributor in each year shall be fixed by reference to the state of affairs on this date in each year: section 23); but it does not follow from this that the amount of the contribution payable by him will necessarily be the same as that payable by the purchaser in respect of the four remaining years. This is the result of section 31, which enacts that for the purpose of determining contributory value for the year 1941 the risk period—and consequently the period during which a change of assessment will be material—shall be deemed to have ceased on January 1, 1941. Where an increase in a Schedule A assessment has occurred since this date, or occurs before August 31 of this year, the first contribution will be less than that payable hereafter. Prospective purchasers of part only of a property which is the subject of a single assessment or valuation should note that their

liability to contributions in the future will be an apportioned part of the contributory value of the total—the apportionment to be made by the Inland Revenue under section 29, with a right of appeal to the Special Commissioners.

At this point it may not be inapposite to stop to consider for a moment the apportionment of liability in other cases between vendor and purchaser. As we have seen above, liability as a contributor will be determined in each year by the state of affairs existing on January 1, 1941, and as it is upon the legal owner that this liability will fall the purchaser who has not yet completed his conveyance will escape. Further, it must also be borne in mind that these contributions are paid in respect of "cover" for the risk period alone, and it is but reasonable therefore that they should fall upon the shoulders of those who enjoyed the advantages of this cover. There is no section in the Act which forbids the making of special contracts for the total or partial indemnification of the vendor by the purchaser, and this aim may also be attained by an increase in the price. This matter should receive attention in all future contracts of sale, and it is suggested that some express provision should also be made to deal with the possibility of a purchaser deliberately delaying completion until after contributory liability for any one year has attached.

Contributions.

The total amount of a contribution levied upon a contributory property will normally be ten shillings in the pound (even this gigantic levy may be increased by the Treasury with the consent of the House of Commons : section 22); but the extraction will be made slightly less painful by being spread over a period of five years, in each of which an annual instalment of two shillings in the pound will fall due on July 1—the first being payable on July 1, 1941. A lower rate of 2s. 6d. in the pound (sixpence in the pound per year) will be levied upon properties whose nature is such that they are not so exposed as others to war damage. Agricultural land and buildings are subject to this special rate, and so also are lands which throughout the risk period were used mainly or exclusively for open-air games, open-air racing or open-air recreation; waste land used only for sporting or gaming purposes is also included in this category, together with shooting, fishing and other similar incorporeal rights (section 20). But not all buildings upon such land are to enjoy this special reduced rate; we find in section 19 (4) that if there are on any sports ground or other similar land buildings which cost more than £5,000, or if there is

a dwelling-house upon waste land, the contributory value of the property as a whole is to be apportioned between the land and the buildings, the latter being regarded as separate properties, and it is then provided in section 20 that these separate properties shall remain liable to the full rate of 10s. in the pound.

A small but important provision is contained in section 21, which declares that where property has been put to a special use as a result of the war it shall be deemed to have been used or occupied as it was normally used or occupied in the past.

Relief from liability to pay contributions can sometimes be claimed on special grounds affecting the direct contributor or the contributory property, and of these it is thought that those dealing with trustees and with war damaged land are the most important. Dealing first with trustees we find that, although they will be personally liable for payment of the contributions where their legal ownership of the property in question renders them the direct contributors (in the case of a strict settlement the tenant for life will be the direct contributor), it has been recognised that, despite the power to raise contributions out of capital (section 48), this may result in severe hardship if the trust property is insufficient or cannot be realised and the right of indemnity against the *cestui que trust* is ineffective. In such a case the trustee may apply for relief in any proceedings which may be taken against him for the enforcement of his liability (whether as a direct or an indirect contributor); if he can show that his liability arose out of his capacity as trustee and that "his rights of indemnification out of the trust estate are, otherwise than by negligence or default on his part, insufficient to provide for his reimbursement in respect of the liability, the Court may give such directions for the limitation or release of the liability as the Court thinks just and equitable" (section 47). This section makes the possibility of raising the amount of the contribution out of the trust estate the sole criterion, and it would seem therefore that no regard may be had to any possibility of indemnity out of other property of the *cestui que trust*; but it will be observed that the power of the Court is apparently discretionary, and it is thought to be improbable that it will be exercised except where the trustee would be out of pocket if forced to make the contribution.

There are other important rights to relief if the property suffers war damage. As soon as the Commission intimate that it is probable that a value payment will be made in respect of any property, no further contributions will be payable, but those unpaid will be deducted from the amount of any value payment which may eventually fall to be made. Similarly, if property is rendered

unfit (the definition is that contained in the Landord and Tenant (War Damage) Act, 1939, which is at present before the Courts in several cases) the Commissioners of Inland Revenue " shall take no steps to recover the whole or any part of any instalment or contribution falling due in respect thereof . . . unless and until they are satisfied that it has been rendered fit " (section 33). This raises a number of difficult points. Although it is not clear, it is thought that the relief does not extend to contributions which have fallen due but have not been paid; such instalments could hardly be said to be " instalments *falling due* ". Liability is only suspended and not relieved; it follows that as soon as the property is rendered fit the whole of the instalments in arrear will become immediately payable in full.

Contributions will be collected by the Commissioners of Inland Revenue, and the income tax machinery is to be adapted for this purpose.

The contributions are a purely personal liability, and are not charged upon the land in any way, nor will they run with it so as to bind a purchaser. For the purposes of the Income Tax Acts and the Settled Land Act, 1925, they are capital payments (sections 48, 84), and recourse may therefore be had to capital to discharge them.

The former of these two facts will be of great importance to conveyancers. It must be considered together with the rule already discussed that the liability to make a contribution in any one year will be determined by reference to the state of affairs in existence on January 1 in the year in question. The legal owner on that date will remain liable to pay the contribution falling due on July 1 in that year whatever may happen to the land in the meantime, and, although it is thought that he may obtain a contractual indemnity from a purchaser, he cannot shift his immediate liability on to the latter's shoulders. The purchaser, on the other hand, who completes after January 1 in any year will know that he takes the land free from any liability to contribute *in that year*, and that (apart from any special contract) he cannot be called upon to indemnify his vendor nor to discharge the latter's obligation should he be unable to do so himself.

In section 46 the Act provides that if property suffers war damage whilst it is the subject of an uncompleted contract of sale (which is not rescinded) the vendor will hold any value payment which may be made on trust for the purchaser subject to the usual vendor's lien. There is here a close analogy with the provisions of the Law of Property Act, 1925, as to fire insurance moneys, but we are not here dealing with an insurance contract and there is, therefore, no necessity to obtain the consent of the Board of Trade

to the contract. Since the vendor is thus to obtain the benefit of the cover, it seems only reasonable that he should be made by the contract to shoulder the proportion of the contribution attributable to the period between contract and completion.

One substantial source of injustice is foreseen. Although there are provisions in section 46 designed to secure that a devise of land will carry with it the right to any compensation, there is no similar attempt to deal with liability to contributions. As these are a purely personal liability it would seem that if a testator dies after January 1 in any year the liability to the contribution will fall upon the residuary estate and not upon the shoulders of the devisee to whom the property in respect of which the contribution is payable is left. A similar result can be foreseen where a testator dies before January 1 in any year but there is no vesting assent until after that date. The direct contributor will then be the personal representative whose right of indemnity will, it is suggested, be enforceable against any residuary estate.

DIRECT CONTRIBUTORS.

When once it has been decided that a particular property is a contributory property, subject either to the full rate of 10s. in the pound or to the lesser rate of 2s. 6d., it then becomes necessary to determine by whom the contributions will be paid and the extent to which, if at all, the person paying them will be entitled to any indemnity or assistance from anyone else.

The nomenclature of the Act is simple; the person actually liable to pay the contribution is called the "direct contributor" and any person upon whom he may call for a partial indemnity is described as an "indirect contributor".

Bearing in mind that liability in each year is determined by the state of affairs existing on January 1 in that year—defined as "the relevant date"—we find that the direct contributor will be the owner of that proprietary interest which as against the others carried on the relevant date the right to possession of the whole of the contributory property (section 23). To be fully understood this definition must be read together with section 45 (1), which enacts that references to the owner of a proprietary interest shall be construed as references to the person in whom the legal estate in respect of that interest is vested, or, if the interest is a tenancy under an agreement for a lease, the person entitled to have vested in him the legal term agreed to be created; regard must also be had to section 95 (1), where "proprietary interest" is defined as

" (*a*) the fee simple in the land comprised therein or in any part of that land; and

" (*b*) any tenancy of that land or of any part thereof, other than a short tenancy ".

It is the last words that are important in the present connection, for on further reference to section 95 it will be found that " short tenancy " is defined as a tenancy originally granted for a term of seven years or less (the amount of time still to run is immaterial), a tenancy for a longer period if the landlord had the right to break at or before the end of the first seven years, and a tenancy from year to year.

The direct contributor in respect of most properties may now be discovered with ease. The fee simple owner in possession is the first and most obvious example; the estate owner under a strict settlement or trust for sale is another. Where the contributory property is mortgaged it is clear that the mortgagee's right to possession (confined as it now is by the Possession of Mortgaged Land Act, 1939) does not render him a direct contributor, though he will become one should he actually take possession, whether personally or by a receiver. In long leases the lessee will be the direct contributor (unless there is a sub-lease), but where the lease falls within the definition of a short tenancy as explained above the tenant's ocupation will be disregarded and the landlord will be directly liable for the contributions.

The obvious difficulties that would arise where there is no proprietary interest subsisting in the whole of a contributory property, as *e.g.* because it has been let in parcels or because part has been sold, are dealt with in section 29, which empowers the Inland Revenue to apportion the contribution between the owners of the respective interests.

Indirect Contributors.

The direct contributor may be entitled to a partial indemnity (notwithstanding any contract to the contrary : section 34) where there is either a lease or mortgage of the contributory property or part of it.

In the case of leases the view has prevailed that where a lease has still a great many years to run the interest of the tenant so far exceeds that of the landlord that the former should bear the whole of the contributions—this may be regarded as the corollary of the immunity conferred upon tenants who hold on short tenancies. There is, therefore, no right in the lessee to call for a partial indemnity where there remains at the relevant date in any year (*i.e.*, January 1) more than 100 years of the term still

to run. In this case it is not the original length of the term that is material but the length of the unexpired portion, so that a lessee whose unexpired term has 102 years to run will be entitled to an indemnity from his lessor in respect of his last two contributions. Where this requirement has been satisfied the landlord is bound to indemnify his lessee against a proportion of the contribution, the extent of this liability depending upon the length of the unexpired term and the proportion borne by the rent reserved to the annual value. The longer the unexpired term and the lower the rent in relation to the annual value, the greater is the share which the lessee will have to bear; conversely, the shorter the unexpired term and the larger the rent the greater the burden which may be passed on to the lessor. The extent of the indemnity payable in any one case may be ascertained by reference to the table printed in the Fourth Schedule to the Act; it must suffice here to say that it ranges from 97½ per cent. in the case of a tenancy which has less than five years to run, and where the rent is three-quarters or more of the annual value, to 10 per cent. where the lease has more than fifty years to run and the proportion of rent to annual value is less than one-quarter. The same schedule also contains similar provisions relating to sub-tenancies and superior tenancies, and will enable an apportionment to be made where part only of a contributory property is leased or where it is let off to more than one tenant.

It was not the original intention of the framers of the Act to give any similar relief to mortgagors, although when compensation is paid it will go to the mortgagee as if it were proceeds of sale (section 9 (4)), but private pressure was so strong that a limited concession was made.

In certain very limited cases a mortgagor may recover from his mortgagee a partial indemnity, the extent of which will depend upon the ratio between the amount secured by the mortgage at the relevant date and the price of acquisition of the mortgaged property (or, where the mortgage was created on the occasion of the acquisition of the property before January 1, 1932, and the value at the relevant date is less than four-fifths of that price, the value of the property in the open market at the end of March, 1939). The amount of the indemnity varies from one-sixth to two-thirds of the mortgagor's liability, the latter being recoverable when the amount secured by the mortgage exceeds three-quarters of the price of acquisition.

But it is only in a few special cases that even this partial indemnification will exist. The right to an indemnity is confined to those cases in which the contributory value of the property in

question does not exceed £150 if it is residential or £500 if it is agricultural, and it extends only to mortgages which were created to finance the acquisition of the property or the cost of executing repairs or alterations thereto. The whole object of the section is to protect the small householder, and it is therefore expressly provided that if the mortgage was created to finance the acquisition or alteration of more than one property there will be no right to contribution (section 25).

The tenant or mortgagor may have recourse to any legal remedy to enforce his right to an indemnity, and is also authorised by section 28 to deduct it from any payment of rent or of mortgage interest or capital.

When a mortgagee becomes himself the direct contributor by virtue of possession, whether by himself or a receiver, he will enjoy any rights of indemnification which his mortgagor would have enjoyed, and may add the proportion of the liability which falls to be borne by the mortgagor to the capital secured by the mortgage. The section is so worded as to suggest that where this capital is repayable by instalments the mortgagor's only liability in respect of his share of the contribution will be to discharge it by instalments in due course, but it is thought to be probable that every effort will be made to hold the mortgagee's right to be indemnified in such cases to be immediate.

War Damage.

Sections 1—17 inclusive form a code for the payment of compensation for war damage to land or buildings. Such payments may be of three kinds, called respectively "temporary works payments", "cost of works payments" and "value payments". But before we proceed to examine them in a little detail it is desirable to ascertain the meaning attributed to "war damage". This phrase has been much used in earlier emergency legislation, and the definitions there used have been discussed both in the *Conveyancer* and elsewhere. The definition in section 80 of the War Damage Act, 1941, is new and is deliberately drawn in rather narrower form than its predecessors. For the purposes of the Act war damage will mean :—

"(*a*) damage occurring (whether accidentally or not) as the direct result of action taken by the enemy, or action taken in combating the enemy or in repelling an imagined attack by the enemy;

"(*b*) damage occurring (whether accidentally or not) as the direct result of measures taken under proper authority

to avoid the spreading of, or otherwise to mitigate, the consequences of such damage as aforesaid;

"(*c*) accidental damage occurring as the direct result—

"(i) of any precautionary or preparatory measures taken under proper authority with a view to preventing or hindering the carrying out of any attack by the enemy; or

"(ii) of precautionary or preparatory measures involving the doing of work on land and taken under proper authority in any way in anticipation of enemy action,

being, in either case, measures involving a substantial degree of risk to property:

"Provided that the measures mentioned in paragraph (*c*) of this subsection do not include the imposing of restrictions on the display of lights or measures taken for training purposes."

Damage caused by official fire-fighting squads will fall within this definition, and so will damage caused by the detonation of enemy bombs and mines by our own experts or the demolition of dangerous property.

This definition should be read in conjunction with section 81 (3), which deprives the subject of any right of action he might otherwise have had against anyone who by nuisance, negligence or breach of duty has caused war damage to his land or goods.

War damage is physical damage to property; all consequential loss such as loss of profits, the cost of alternative premises, etc., is excluded. As the prohibition in section 81 is confined to actions claiming damages for *war damage*, it is thought to be clear that any right of action for other losses recoverable at law will be unaffected. In any event the protection only extends to action taken by or on behalf of a Government department, being action with which that department is concerned (section 81).

NOTIFICATION OF DAMAGE.

This subject is dealt with in the War Damage (Notification and Claims) Regulations, 1941, which have been made under section 10, and which distinguish between the notification of war damage and the presentation of a claim for compensation (as to which see below). Subject to the power of the Commission to extend the time limit, notification of the occurrence of war damage should be given to the Commission within thirty days on a simple form which has been compiled for this purpose (Form C.1) and may be obtained from the Commission or from law stationers.

The giving of this notification will usually be a condition precedent to the award of any compensation, and it is most important that it should be clearly appreciated that it will not be possible to rely upon a notification filed by some other person who is interested in the same property. Every potential claimant should, therefore, protect himself by completing one of these forms within the time limit or as soon after as possible. We shall see below that the destination of compensation varies according to the nature and extent of the damage, and that whereas a value payment will be distributed amongst those who had proprietary interests in the land at the time of the damage, if the compensation takes the form of a cost of works payment it will be paid solely to the person who incurs the expense of repairing the damage. It will not usually be possible to foretell what form the compensation may ultimately take, and it is accordingly desirable that no person who may desire to put in a claim should omit to notify the occurrence of the damage. In the words of the Order this means that Form C.1 should be completed by "such of the following persons as propose to make a claim . . .

"(*a*) every owner of a proprietary interest subsisting in the land immediately before the occurrence of the war damage;

"(*b*) every person who is under an obligation or has the right to execute works in respect of the war damage [local authorities are excepted save where they are themselves interested as owners of a proprietary interest]; and

"(*c*) if any proprietary interest in the land was subject to a mortgage immediately before the occurrence of the war damage, any mortgagee of that interest."

It is thought that these persons will be well advised to notify the damage in all cases. They should also do so whether or not the damage occurred before the Act was passed unless they themselves have completed a Form V.O.W.1, in which case they are relieved by the Order from giving any further notice or details until asked to do so. The Order makes no attempt to deal with the many persons who have relied in the past on the fact that some other person interested in the damaged property has completed a V.O.W.1 form, but it is suggested that they should file a Form C.1 at the earliest opportunity.

It will be remembered that the Landlord and Tenant (War Damage) Act, 1939, gives both landlords and mortgagees *the right* to repair war damage and, whilst relieving all parties from any previous obligation to do so, contains provisions which may result in such an obligation being created.

COMPENSATION.

The compensation payable for war damage to land or buildings may take one of three forms. The payment may be a cost of works or a temporary works payment or it may be a value payment, according to principles which will be explained below. But in all cases the Commission are directed to give overriding consideration to the public interest, both as respects town and country planning, the preservation of amenities, the provision of housing accommodation, and any other matters of public concern. They are authorised by section 7 to impose restrictions on the type and nature of repairs and to disregard the general principles laid down by the Act wherever it seems to them desirable to do so; notice of any conditions or restrictions imposed under this section will be advertised in the *Gazettes* and registered as a local land charge under the Land Charges Act, 1925 (section 7 (6)).

Subject to the special powers created by this section, the type of payment which compensation is to assume in any particular case may be ascertained on reference to the Act.

COST OF WORKS PAYMENTS.

This will be the usual form in which compensation will be payable for damage to a developed hereditament (that is, one comprising buildings, parts of buildings or the sites of buildings (section 2)); it will, broadly speaking, be the cost of repairing the damage, but there have, of course, to be safeguards. Only the "proper cost" can be recovered, that is, the reasonable cost of restoring the property, including the cost of professional advice (section 2 (3)) credit being given for the value of any salvaged materials (section 3 (6)), and if it is unreasonable to restore the property to its original condition because part of the work of restoration could be omitted without diminishing the value of the result or if, as sometimes happens, the very omission would increase the value, then the amount of the compensation will be reduced by the amount of this unnecessary work. As it will often happen that it is desired to rebuild the property in an altered form, the Act makes detailed provision for this contingency. The compensation awarded in such a case will be the "permissible amount" of the cost of repairs, which amount is defined in section 3 (2) as being the amount which would be payable as a cost of works payment if the repairs were actually executed. If, then, damaged property is rebuilt in a different form the compensation payable will be calculated by reference to the actual cost of the work, but

will be limited to what would have been the cost of restoring the property to its original condition.

A cost of works payment will be paid to the person who actually discharges the cost of the repairs or who has made himself liable to do so (if there are two or more such persons it may be apportioned) (section 9 (1)); the time for payment will be the date of completion of the works or, where payment by instalments is agreed to by the Commission, the completion of any instalment (section 8 (1)).

Temporary Works Payments.

These do not call for much explanation. They are supplementary to the payment of a cost of works or value payment, and will be limited to "the proper cost of any works reasonably executed for temporarily meeting the circumstances created by the damage". The basis on which a value payment will be made is that it would be unprofitable to restore the property; once, therefore, the Commission have announced their intention to make a value payment in respect of any property it would be unreasonable to carry out any further repairs, and should anyone do so he will find that no temporary works payment can be made for such work (section 5). Anyone who is proposing to execute repairs to damaged property will be wise to give notice to the Commission under this section, for he will then be notified of their decision and may safely assume until he receives such notification that he may proceed with the repairs (regard must, of course, be had to the entirely different rules restricting the execution of any building work without licence if the cost exceeds £100 and the work is not solely "first aid" repairs to war damaged property). Payment of a temporary works payment will be made on completion of the work and possibly, as in the case of cost of works payments, by instalments (section 8 (1)).

Value Payments.

The third and last type of compensation is the value payment. It was around this that the controversy in the House of Commons waged hottest, since it will be calculated by a method which is bound to result in very substantial loss to the claimant and which will undoubtedly cause him to look with envy at his happier neighbour who has obtained a cost of works payment.

Value payments will be the form which compensation will usually take when the property was undeveloped; but they will also be made whenever the extent of the damage is such that the

property is a total loss. This phrase, which is, of course, borrowed from marine insurance, is given a definition in section 4 (1) (*a*). Property is to be treated as a total loss if the cost of works of repair would exceed the resultant increase of value between the property in its damaged condition and after restoration. Although for most purposes—including that of assessing value for compensation—the values prevailing on March 31, 1939, are to be taken as the test, there does not seem to be any clear indication in the Act as to the precise moment at which the values for determining whether or not property is a total loss are to be ascertained. With the steady increase in the cost of repairs and the fall in the value of property it is a matter of regret that this should be left uncertain. In all probability the values prevailing when the Commission considers the case in question will be accepted.

When it falls to be made, a value payment will be calculated at the market value—free from incumbrances but subject to any such rights as rights of way, etc.—of the property, but the valuation will be based not on current prices but on those prevailing at the end of March, 1939. The justification for this strange restriction was that some date must be chosen on which prices were reasonably stable. Such a reason can be easily understood, but is no justification for refusing to recognise the change in values since that date. A very slight concession has been made, and section 14 enables the Treasury to "recommend" an increase if matters occurring *after the passing of the Act* cause the compensation to be seriously inadequate. The major criticism advanced at the moment is that the change in values *before the Act was passed* have already rendered it unjust.

After having been assessed in this manner value payments will be paid (not necessarily at once) to the person or persons having proprietary interests in the property—apportioned, if necessary, "in shares proportionate in value to the amount of the depreciation in value which they respectively suffer" (section 9 (2)), the valuation being again made by reference to the standard of March, 1939.

The tenants of short tenancies (the definition of this term has already been discussed) will get nothing, and the mortgagee has been somewhat unfairly preferred over his mortgagor in that the whole of the compensation payable in respect of a mortgaged interest will be paid to the former and received by him as if it were the proceeds of sale. Unless further legislation is introduced later the mortgagee will thus be entitled to a full indemnity out of the compensation and, should this be insufficient, will still have recourse to his personal covenant to exact the final penny.

The date when value payments will be made remains uncertain. It is to be fixed by regulations to be made by the Treasury (section 8). Up to date their Lordships have merely authorised the Commission to make payments whenever they think the public good demands it (War Damage (General) Regulations, 1941, paragraph 3).

Minimum Claims and Aggregation.

Amongst the endless number of points of interest raised by the Act, attention is directed to section 12, which provides for the reduction of compensation if there has been an unreasonable neglect to minimise the consequences of war damage. This section must now be borne carefully in mind by everyone whose duty it is to advise landlords and tenants under the Landlord and Tenant (War Damage) Act, 1939. Although the latter Act expressly abrogates any obligation, express or implied, to repair war damage, the present provisions remain of importance, for they affect rather those who could have repaired than those who were bound to do so.

Although there is a minimum limit of £5 for compensation payments, aggregation of damage will be permitted, whether it was sustained in respect of different properties or on different dates; but this wise privilege is subject to a remarkable and seemingly senseless limitation in section 11, which restricts it to properties within the same "housing area" as defined in the Housing Acts.

The Commission have power (section 2 (2)) to deal with land in such units as they consider suitable. They may, therefore, claim to treat a damaged garage as distinct from the house to which it is annexed, and thus make a value payment in respect of it. The avowed object of this section was to enable them to deal effectively with any attempt to "juggle" with values by treating a number of buildings as if they formed a single unit; many difficulties are foreseen and there are bound to be anomalous cases.

Claims.

Claims for payment of compensation are now dealt with in the War Damage (Notification and Claims) Regulations, 1941, under section 10. The presentation of a claim for payment is quite distinct from the notification of damage, though the latter is a condition precedent (unless waived) to the payment of compensation (paragraph 9 of the Order). Special forms will be supplied to all those who have filed notification of damage, and the claim must, in the case of cost of works or temporary works

payments, be filed within thirty days of the conclusion of the work or of the receipt of the form, whichever is the later. Value payments must be claimed within six months of the receipt of the form. These forms require careful consideration, and professional advice will usually be required before they can be completed. Service may be by post (paragraph 10).

It has already been observed that value payments may in suitable cases (they are likely to be rare) be made immediately. There is also provision of a more useful nature in section 8 by which a sum up to £1,600 may be paid to anyone who has lost living or business premises and requires assistance to obtain alternative accommodation for either purpose. The sum payable is limited to £800 for either purpose, but the payments may be cumulative whether or not the one premises were used for both purposes.

Highways, the property of public utility companies, and charities are specially dealt with.

ASSIGNMENTS.

In a laudable attempt to prevent speculation the Act provides, in section 9 (7), that the right to compensation shall not be capable of assignment except with the written consent of the Commission. But it must be remembered that cost of works and temporary works payments will be made to the person or persons who actually carry out the work, and there is no prohibition on the sale of damaged land, though claims presented by the purchasers will be closely scrutinised, and if it is decided to make a value payment this will go to those who had proprietary interests in the property *at the time of the damage*, to the total exclusion of the purchaser.

Damage occurring between contract and completion is, as we have seen, dealt with in section 46, which also provides that a devise of land shall be deemed to carry the right to any value payment in respect of it, provided that it was made before the damage occurred.

LIABILITIES OF LANDLORD AND TENANT IN RESPECT OF DISREPAIR, NUISANCE AND DANGEROUS PREMISES.

By Lionel A. Blundell, LL.M., Barrister-at-Law.

Part III.

Duties Owed to Third Parties on the Demised Premises.

(i) *Liability of the Landlord.*

Where a stranger to the contract of tenancy comes upon demised premises and sustains injury by reason of some defect or danger existing therein, his claim, if any, is against the tenant in possession and not against the landlord. This appears clearly from the classic case of *Robbins* v. *Jones* (1863), 15 C. B. (N.S.) 221, where Erle, C.J., said : " A landlord who lets a house in a dangerous state is not liable to the tenant's customers or guests for accidents happening during the term : for, fraud apart, there is no law against letting a tumble-down house; and the tenant's remedy is upon his contract, if any." So in the leading case of *Cavalier* v. *Pope*, [1906] A. C. 428, the owner of a dilapidated house contracted with his tenant to repair it, but failed to do so, and the tenant's wife, who lived in the house, was injured by an accident caused by the want of repair. It was held by the House of Lords that the wife, being a stranger to the contract, had no claim for damages against the owner. Lord Macnaughten, citing the above passage from the judgment of Erle, C.J., in *Robbins* v. *Jones*, said : " The wife, who was not the tenant, cannot be in a better position to recover damages than a customer or guest. Her position is, perhaps, less favourable. She had the advantage or disadvantage of knowing more about the state of the house than any guest or customer could have known."

So, although a third party who is a stranger to the contract of tenancy may have a right against the landlord by virtue of the occupation of adjacent property, or even by virtue of being a passer-by upon an adjacent highway, the moment he sets foot upon the demised premises the landlord ceases to be under any obligation towards him in respect of defects in their condition.

If while he is walking along the highway towards the demised dwelling-house a chimney-pot falls off the house and strikes him the landlord may in certain circumstances be liable to him in damages (see p. 110 of this volume of *The Conveyancer*); but if the accident happened after he had entered the forecourt of the house and while he was actually upon part of the premises demised, only the tenant (and not the landlord) could be held liable in damages, in accordance with the principles stated below. This very point arose in *Bromley* v. *Mercer*, [1922] 2 K. B. 126, where a child visiting the tenant was playing in a yard and was injured by the fall of a stone from a defective wall. This wall was in such a condition that it constituted a nuisance to the highway, and the landlords would have been liable had the child been passing along the highway when the stone fell on her, but as she was actually within the demised premises the landlords were not liable.

This rule applies equally whatever be the occasion which brings the third party upon the demised premises. In *Cavalier* v. *Pope* the unsuccessful plaintiff was the tenant's wife; in *Lane* v. *Cox*, [1897] 1 Q. B. 415, he was a workman who came upon the premises at the request of the tenant for the purpose of moving some furniture; and in *Bromley* v. *Mercer* (*supra*) the plaintiff was a child visiting the tenant. The essential feature of all these cases is that the plaintiff, though lawfully upon the demised premises by permission of the tenant, is actually a stranger to the contract of tenancy. Even the statutory obligation implied under section 2 of the Housing Act, 1936, cannot be taken advantage of by a stranger to the contract, but only by the tenant himself : *Ryall* v. *Kidwell*, [1914] 3 K. B. 135 (injury to tenant's daughter); *Middleton* v. *Hall* (1913), 108 L. T. 804 (injury to tenant's wife).

It must be clearly understood that this rule, strict as it is, does not prevent the tenant recovering as special damages from his landlord, in an action for breach of contract, the amount of any expenses incurred by him, the tenant, in respect of injury caused to his wife or child in consequence of the landlord's breach of contract with the tenant : *Allen* v. *Waters & Co.*, [1935] 1 K. B. 200.

It is necessary to mention here the special case which might at first sight appear to provide an exception to the rule stated above, but is in fact only a further exemplification of the principle that it is the party in possession who is liable to the third party in respect of defects in the premises. Where the landlord retains in his possession and control something ancillary to the premises demised, such as a staircase giving access to them or a roof

covering them, he is under an obligation to avoid exposing a licensee to a concealed danger without giving him warning: *Lucy* v. *Bawden*, [1914] 2 K. B. 318. This obligation on the part of the landlord will be considered further below.

(ii) Liability of the Occupier (*a*).

We have seen above that it is to the tenant in possession, the occupier, not the landlord, that a third party must look for compensation if he suffers harm, while on the demised premises, by reason of their defective condition. We must now consider the extent of the occupier's liability in such a case.

In the first place there may be a contract between the occupier and the third party regulating the obligations of the former towards the latter. Even where there is no express term of the contract regarding the condition of the premises or the responsibility for accidents occurring thereon, there may be an implied obligation which can best be stated in the following terms: "Where the occupier of premises agrees for reward that a person shall have the right to enter and use them for a mutually contemplated purpose, the contract between the parties (unless it provides to the contrary) contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises": *per* McCardie, J., in *Maclenan* v. *Segar*, [1917] 2 K. B. 325. Subject to this limitation it seems not to matter whether the lack of care or skill be that of the defendant or his servants or that of an independent contractor or his servants, or even whether the negligence takes place before or after the occupation by the defendant of the premises: *ib.*, *per* McCardie, J. So in *Francis* v. *Cockrell* (1870), L. R. 5 Q. B. 184, 501, the defendant owned a racecourse and contracted with a builder for the erection of a stand thereon; afterwards the plaintiff bought a ticket of admission and entered the stand. Through the negligence of the contractor the stand was defective and fell and injured the plaintiff: it was held by the Court of Exchequer Chamber that the defendant was liable, although guilty of no negligence, by virtue of the implied

(*a*) It is not proposed, within the limits of this article (from which, owing to considerations of space, mention of many relevant cases has necessarily been excluded), to examine the special principles which affect the liability of the occupier as regards children.

warranty contained in his contract with the plaintiff. See also *Liebig's Extract of Meat Co.* v. *Mersey Docks and Harbour Board*, [1918] 2 K. B. 381, and *Silverman* v. *Imperial London Hotels, Ltd.* (1927), 137 L. T. 57.

In the case of contracts where there is no stipulation, as mentioned above, for a right to enter and use the premises for a mutually contemplated purpose, but where it is mutually contemplated that the contract shall be performed upon premises in the occupation of one of the contracting parties, there is an implied undertaking by the occupier to use reasonable care for the safety of the other contracting party, and the occupier is liable only for dangers the existence or continuance of which is due to the negligence of himself or his servants. So the lessee and manager of a theatre who arranges for the performance of a play in his theatre owes a spectator who has purchased a ticket to view the play a duty to use reasonable care that she is not exposed to unusual danger the existence of which the defendant either knew or ought to have known : *Cox* v. *Coulson*, [1910] 2 K. B. 177. Likewise a person who undertakes the carriage of another, even gratuitously, must exercise a reasonable degree of care : *Harris* v. *Perry*, [1903] 2 K. B. 219. This applies to the carriage of passengers in a lift, it being the duty of the occupier of the lift to take reasonable care not only in the control and management of the lift but also in seeing that it is safe for passengers : *Haseldine* v. *Daw* (1941), 57 T. L. R. 431. A frequent occasion for the application of the principle now under consideration is the case of a workman employed in premises in the occupation of his employer : the employer's duty is to take reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk : *Smith* v. *Baker*, [1891] A. C. 325; *Williams* v. *Birmingham Battery Co.*, [1899] 2 Q. B. 338. As regards defects in the premises themselves the employer is liable only if he has negligently failed to secure a proper inspection of the premises : *Cole* v. *De Trafford*, [1918] 2 K. B. 523, where Scrutton, L.J., said, as to the employer's duty : "He is bound to use reasonable care to provide safe premises and appliances for his servant to work in and with, and to use reasonable care to keep them safe." Of course knowledge of the danger on the part of the employee may in a particular case be evidence of contributory negligence on his part.

We now come to consider the liability of the occupier apart from any contract between himself and the person who comes upon his premises : that is to say, his liability in tort. In this respect

the law recognises three categories of obligation, the duty of the occupier being graduated through those categories. This introduces the celebrated distinction between invitees, licensees and trespassers: see *Latham* v. *Johnson*, [1913] 1 K. B. 398, *per* Hamilton, L.J., at p. 410: "The lowest is the duty towards a trespasser. More care, though not much, is owed to a licensee—more again to an invitee. The latter term is reserved for those who are invited into the premises by the owner or occupier for some purpose of business or of material interest. Those who are invited as guests, whether from benevolence or for social reasons, are not in law invitees but licensees." See also, as to this distinction, *Haseldine* v. *Daw* (1941), 57 T. L. R. 431, *per* Hilbery, J.

An example of an invitee is provided by *Indermaur* v. *Dames* (1866), L. R. 1 C. P. 274, where the plaintiff was the servant of a gasfitter employed by the occupier and was at the time of his accident testing gas-fittings on the premises; in *Elliott* v. *Roberts & Co.*, [1916] 2 K. B. 518, the invitee was a workman employed by a sub-contractor on works being carried out by the defendant, the head contractor. The same position arose in *Woodman* v. *Richardson*, [1937] 3 All E. R. 866. In *Pritchard* v. *Peto*, [1917] 2 K. B. 173, a tradesman calling at a house for payment of his account was held to be an invitee. In *Campbell* v. *Shelbourne Hotel, Ltd.*, [1939] 2 K. B. 534, the invitee was a guest at an hotel. There are, of course, numerous other cases on the question who is and who is not an invitee (see *Clerk & Lindsell*, 9th ed., p. 529); those cited above afford some indication of the classes of persons comprised within the term. See further, as to customers in a shop, the observations of Willes, J., in *Indermaur* v. *Dames*, *supra*; *Brannigen* v. *Harrington* (1921), 37 T. L. R. 349; *Parnaby* v. *Lancaster Canal Co.* (1839), 11 A. & E. 223.

The question of the extent of the occupier's duty to an invitee raises an interesting point which has long been the subject of controversy. *Indermaur* v. *Dames* left open the question whether his duty is to use reasonable care to make the premises reasonably safe for the invitee, or is merely to use care to ascertain the existence of dangers and either to remove them or give the invitee due warning of their existence (see *Salmond on Torts*, 7th ed., p. 461). The former view is supported by *Norman* v. *G. W. Ry.*, [1915] 1 K. B. 584 (C. A.), where Buckley, L.J., said at p. 592: "The duty of the invitor towards the invitee is to use reasonable care to prevent damage from unusual danger which he knows or ought to know." On the other hand the alternative and more restricted view stated above is supported by Lord Atkinson in

Cavalier v. *Pope*, [1906] A. C. 428, at p. 432, and by *Brackley* v. *Midland Ry.* (1916), 85 L. J. K. B. 1596. In *Campbell* v. *Shelbourne Hotel, Ltd.*, [1939] 2 K. B. 534, Cassels, J., expressed the rule as being quite simply that to an invitee the occupier "owed the highest duty to take reasonable care that the premises were safe", and this seems to favour the view first above mentioned. Similar words were used *obiter* by Hilbery, J., in *Haseldine* v. *Daw* (1941), 57 T. L. R. 431, where he described the duty as being "to exercise reasonable care to see that the premises were reasonably safe for the plaintiff". The doubtful point raised by this conflict of authorities was expressly kept open by the Court of Appeal in *Hillen* v. *I. C. I.* (*Alkali*), *Ltd.*, [1934] 1 K. B. 455, and on the view of that case taken by the House of Lords the point did not arise : [1936] A. C. 65. In *Addie* v. *Dumbreck*, [1929] A. C. 358, the question did not actually arise, and Lord Hailsham, L.C., in observing that towards invitees "the occupier has the duty of taking reasonable care that the premises are safe", seems to have left this point intentionally vague. It can only be stated, therefore, that the question is still an open one, though some of the recent *dicta* definitely favour the wider definition of the duty.

In any case the invitee, in order to succeed, must establish that there was negligence, that is to say, a failure to use due care, on the part of the occupier : *Woodman* v. *Richardson*, [1937] 3 All E. R. 866. Where there is a danger which the occupier could not reasonably be expected to guard against, he does not fail in any duty owed to an invitee if he does not anticipate that danger : *Simons* v. *Winslade*, [1938] 3 All E. R. 774, C. A. And where an accident is due to the invitee's own want of care, he has no ground of action against the occupier : *Howard* v. *Farmer & Son, Ltd.*, [1938] 2 All E. R. 296, C. A. A good example of a want of care on the part of the occupier which gave an invitee a valid right of action for damages is afforded by the case of *Campbell* v. *Shelbourne Hotel, Ltd.*, [1939] 2 K. B. 534, where the hotel-keeper failed to keep a passageway reasonably lighted at 11.20 p.m. in an hotel in London, Cassels, J., holding that the use of that passageway by guests should have been regarded as reasonable at any rate until midnight.

Moreover, an occupier's duty towards a person as invitee extends only so long and so far as the invitee is making what can reasonably be contemplated as an ordinary and reasonable use of the premises by the invitee for the purposes for which he has been invited. He is not invited to use any part of the premises for purposes which he knows are wrongfully dangerous and

constitute an improper use: *Hillen* v. *I. C. I. (Alkali), Ltd.*, [1936] A. C. 65.

Where a person enters by permission of the occupier but not for the purpose of some matter in which the occupier has himself a pecuniary or material interest, he is a "licensee" and not an "invitee". An example of the distinction is afforded by the case where the landlord retains in his possession and control a staircase (as to which he is therefore in the position of occupier) giving access to the tenant's premises; a person who mounts the staircase for the purpose of business which he has with the tenant is an invitee of the tenant but merely a licensee of the landlord: *Fairman* v. *Perpetual Investment Building Society*, [1923] A. C. 74, *per* Lord Wrenbury, at p. 95. So in *Haseldine* v. *Daw*, *supra*, the person using the landlord's lift for the purpose of visiting a tenant on an upper floor was a licensee of the landlord while in the lift. The duty of an occupier towards a licensee is defined in those two cases and in *Gautret* v. *Egerton* (1866), L. R. 2 C. P. 371. The duty is not knowingly to expose the licensee to a hidden peril. If there is some danger of which the occupier knows but which is not known to the licensee or obvious to the licensee using reasonable care, the occupier owes a duty to the licensee to inform him of it. There must be something in the nature of a trap, something which a reasonable person, using reasonable care, might not see. The duty to a licensee, as stated in *Fairman's Case*, is again exemplified by *Mersey Docks and Harbour Board* v. *Procter*, [1923] A. C. 253, where Lord Sumner says, at p. 274: "The occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances . . . The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen." The same principle has been laid down by the Court of Appeal in *Ellis* v. *Fulham Borough Council*, [1938] 1 K. B. 212, and applied in *Pitt* v. *Jackson*, [1939] 1 All E. R. 129, as well as in *Haseldine* v. *Daw*, *supra*.

Now in *Fairman's Case* there are *dicta* in the opinions of Lord Atkinson and Lord Wrenbury to the effect that an occupier may be responsible to a bare licensee in respect not only of dangers known to the occupier but also of dangers of which he ought to to have known. But the suggestion has frequently been made that these *dicta* were made *per incuriam* (see, for example, *Salmond on Torts*, 7th ed., p. 457). This suggestion is supported by the judgment of Bankes, L.J., in *Sutcliffe* v. *Clients' Investment Co.*,

[1924] 2 K. B. 746 (C. A.), at p. 754. Certainly the requirement of actual knowledge on the part of the occupier appears clearly from *Gautret* v. *Egerton*, *supra*, where Willes, J., brings the case under the principle applicable to gifts, saying: "The giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable." This is a clear enough doctrine, and by the requirement of actual knowledge on the part of the occupier a definite distinction is drawn between the liability to a licensee and that to an invitee. But oddly enough Lord Hailsham, L.C., in *Addie* v. *Dumbreck*, [1929] A. C. 358, followed, apparently by inadvertence, the *dicta of* Lords Atkinson and Wrenbury, for he says, at p. 365: "In the case of persons who are not there by invitation but who are there by leave and licence, express or implied . . . the occupier has no duty to ensure that the premises are safe, but he is bound not to create a trap or to allow a concealed danger to exist upon the said premises, which is not apparent to the visitor, but which is known *—or ought to be known—*to the occupier." The authority for regarding the words printed in italics above as a slip included by inadvertence is the judgment of Greer, L.J., in the later case of *Ellis* v. *Fulham Borough Council*, [1938] 1 K. B. 212. There Greer, L.J., says: "Unfortunately, by what I think was a slip in giving judgment, he stated the rule as between licensor and licensee as being in effect the same as that between invitor and invitee, and I do not regard the decision of the other members of the Court as agreeing with that part of the finding of Lord Hailsham, L.C. I treat his finding as if the words 'or ought to be known' were eliminated from it, because that is in accordance with the authorities when we are dealing with a case of licensor and licensee." It may be observed that the particular words of Lord Hailsham, L.C., were actually *obiter*, not being essential to the decision of the case before the House. Reference may also be made to *Purkis* v. *Walthamstow Borough Council* (1934), 151 L. T. 30, and *Coates* v. *Rawtenstall Borough Council*, [1937] 3 All E. R. 602, where the rule adopted was that the licensor is liable if there be a danger which is known to him and is not known to the licensee, and which the licensee could not be expected to avoid. Finally, the rule has been stated and applied in the same form in *Haseldine* v. *Daw* (1941), 57 T. L. R. 431, where Hilbery, J., says: "The plaintiff being, however, merely a licensee *vis-à-vis* Mr. Daw as occupier, the latter's duty was to warn him of any danger of which he (Mr. Daw) actually knew." In that case,

although the landlord, who was the occupier of a lift used to provide access to demised premises on the upper floors, knew that some parts of the lift mechanism were in a worn condition, he did not know that their worn condition affected the safety of the lift. The landlord was accordingly not liable in respect of this duty towards a licensee, although, as mentioned above, he was liable in respect of the unsafe vehicle in which he carried the plaintiff as a passenger.

As to the kind of danger meant in the rule as regards licensees, reference may be made to *Pitt* v. *Jackson*, [1939] 1 All E. R. 129, where Croom-Johnson, J., followed the opinion of Lord Sumner in *Mersey Docks and Harbour Board* v. *Procter*, [1923] A. C. 253, and rejected the contention that the rule applied to some highly polished linoleum in a passage, upon which the plaintiff had slipped. Croom-Johnson, J., said : " There must be something unexpected in the particular danger which has been encountered, something which a reasonable man would neither expect nor suspect, to use the words of Lord Sumner, and something which there was nothing to indicate to the person who was going there that he ought to be on his guard "; he accordingly rejected the contention that the polished linoleum amounted to a concealed trap or danger. See also, as to what is a trap, *Morley* v. *Staffordshire County Council*, [1939] 4 All E. R. 92.

We may turn now to consider the liability of the occupier towards a trespasser. That liability is strictly limited in extent and has been defined by Lord Hailsham, L.C., in the following terms in the case of *Addie* v. *Dumbreck*, [1929] A. C. 358, at p. 365 : " Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger. The trespasser comes on to the premises at his own risk. An occupier is in such a case liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser." This follows the doctrine laid down in earlier cases, such as *Ponting* v. *Noakes*, [1894] 2 Q. B. 281, *Grand Trunk Ry. of Canada* v. *Barnett*, [1911] A. C. 361, and others. The occupier must not intentionally create on his premises a trap to harm trespassers : *Bird* v. *Holbrook* (1828), 4 Bing. 628; but of course he may set a trap to catch trespassers, or adopt any reasonable means to keep them out : *The Carlgarth*, [1927] P. 93, *per* Scrutton, L.J., at p. 109; *Deane* v. *Clayton* (1817) 7 Taunt. 521.

(iii) LIABILITY OF THE LANDLORD AS OCCUPIER OF PART OF THE PREMISES.

Where the landlord retains part of the premises in his own possession and control he is, as regards that part of the premises, in the position of occupier. So where strangers come lawfully upon that part of the premises, as where persons having occasion to visit the premises demised to the tenant use for that purpose a staircase or other means of access retained in the possession of the landlord, they are while using that means of access licensees of the landlord, and the landlord's liability towards them is based on the principles stated above as governing the liability of an occupier towards licensees : see *Fairman* v. *Perpetual Investment Building Society*, [1923] A. C. 74, and cases there cited. A recent case exactly in point is *Haseldine* v. *Daw* (1941), 57 T. L. R. 431, where the means of access retained in the possession and control of the landlord was a lift operated by the landlord's servant. The plaintiff, who entered the lift for the purpose of being taken to the flat of one of the tenants, and sustained an accident while in the lift, was there as licensee of the landlord. Other cases which illustrate the liability of the landlord under this heading are *Miller* v. *Hancock*, [1893] 2 Q. B. 177 (as explained in *Fairman's Case*, *supra*), and *Huggett* v. *Miers*, [1908] 2 K. B. 278; see *Woodfall*, 24th ed., p. 813.

(iv) LIABILITY OF THE PERSON WHO CREATED THE DANGER.

We are only concerned here with the liabilities of the landlord and of the tenant, but since the landlord may incur liability not as landlord but by reason of having been the person who created the danger on the premises, it is necessary to mention that branch of the subject. The cases on this branch of the subject are numerous, and it is not proposed to cite here more than a very brief selection.

In *Corby* v. *Hill* (1858), 4 C. B. (N.S.) 556, the defendant obstructed a private road with building material and was held liable for injury caused by the nuisance. The builder who obstructs ancient lights is liable as well as the occupier of the land upon which he has built : *Thompson* v. *Gibson* (1841), 7 M. & W. 456. *Kimber* v. *Gas Light and Coke Co.*, [1918] 1 K. B. 439, C. A., was another case where a contractor was held liable as the party who had created the nuisance or danger. The recent case of *Haseldine* v. *Daw* (1941), 57 T. L. R. 431, already cited above in connection with the liability of the landlord as

occupier of a lift, affords an interesting example of another aspect of this kind of liability. The second defendants in this case by their employee carried out several repairs to the mechanism of the lift but negligently replaced a part in an improper way, with the result that in use an undue strain was imposed on this part and in the ensuing accident the plaintiff was injured. Hilbery, J., found the repairers liable under the principle of *Donoghue* v. *Stevenson*, [1932] A. C. 562; that principle, as applied to such a case, is that " where repairs are effected to an article which will result in danger to its users unless done with reasonable skill and care, and where the circumstances are such that no intermediate examination can reasonably be expected to take place between the completion of the repair and the use of the article, the repairer owes a duty of care to the user " : *Haseldine* v. *Daw*, *supra*, *per* Hilbery, J., at p. 435.

It is clear that the landlord by himself carrying out work on the demised premises may incur a liability as the person who created the danger or nuisance, and it will be his duty to warn persons who are lawfully in the premises of any hidden dangers created or brought on to the premises by him : *Kimber* v. *Gas Light and Coke Co.*, *supra*.

BEQUESTS AND DEVISES FREE OF DEATH DUTIES.

By B. A. Bicknell, Barrister-at-Law.

Many testators wish all the death duties payable in respect of their property to be discharged out of their residuary estate, pecuniary and specific legatees and devisees being exonerated from bearing a rateable proportion of such duties. It is very doubtful whether this practice to-day is convenient or desirable. Rates of duty are very high and constantly changing. Further, it is possible that new duties may be imposed. As a consequence the burden to be discharged by residue may be so great as to reduce to a disastrous extent the benefits taken by the residuary legatees.

However, as large numbers of testators do wish their gifts to be duty free however inexpedient this may be, it is desirable that conveyancers should so provide that effect is given to testators' desires. Practice in this matter to-day is far from uniform, and

the provisions which are commonly inserted in wills lead to so much doubt and uncertainty that not infrequently applications to the Court become necessary to explain their effect. It would seem that conveyancers should revise their practice and endeavour to reframe provisions dealing with death duties.

Three different duties have to be considered, namely: estate duty, legacy duty and succession duty. In the absence of any express provision in the will, the estate duty attributable to a specific or general legacy is not borne by the legatee but is a testamentary expense and is payable out of the general residue: *Re Webber*, [1896] 1 Ch. 914. In the case, however, of a specific devise the estate duty attributable to the property is borne by the devisee: Finance Act, 1894, s. 9 (1). The legacy duty payable in respect of a legacy, however, has to be borne by the legatee: Legacy Duty Act, 1796, ss. 6, 24. Similarly, specifically devised property bears its own succession duty: Succession Duty Act, 1853, s. 42.

Draftsmen when directed to make legacies or devises free of duty have tended to approach this subject piecemeal. They have exonerated each gift in turn from duty and left the matter to rest there. This practice has given rise to a number of problems. First, a question may arise as to what duties come within the exemption; secondly, in the case of settled gifts, whether the exemption extends to duties other than those arising on the death of the original testator; and, thirdly, as to the fund which has to bear the duties.

The formula used to exempt the gift from duty is generally one of the following: "free of duty" or "free of all duties", or in the case of specific legacies, and sometimes in the case of pecuniary legacies, "free of legacy duty".

These formula are open to certain objections. We will first consider the position of pecuniary legacies. The tendency to give these "free of legacy duty" and not simply "free of duty" is probably attributable to the fact that the draftsman has in the back of his mind a recollection that the estate duty is an administration expense. The recent decision of the Court of Appeal in *Re Owers, Public Trustee* v. *Death*, [1941] 1 Ch. 17, shows the danger of this practice where the legacy is payable, as it generally is, out of a mixed fund. This decision appears to have come as an unpleasant surprise to conveyancers, some of whom seem to think that it may further complicate the drafting of those provisions in wills which deal with death duties. This is an unduly gloomy view of the decision which has not in fact resulted in any change in the law.

The Court of Appeal has now held that *Re Spencer-Cooper, Poë* v. *Spencer-Cooper*, [1908] 1 Ch. 130, contains an accurate statement of the law. That authority is over thirty years old but conveyancers appear to have very generally overlooked it and many estates have of recent years it seems not been distributed in accordance with the principle it lays down. This is not as surprising at it might at first sight appear. Sir Wilfrid Greene, M.R., begins his consideration of this authority by saying that it "deals with a point which gives rise, has given rise and no doubt will continue to give rise to unintended results". Subsequently he says: "It is no doubt an unfortunate decision, in the sense that it discloses the existence of a trap into which I have no doubt many testators fall and into which many testators will continue to fall."

The effect of Swinfen Eady, J.'s decision in *Re Spencer-Cooper* is shortly summarised in the headnote as follows: "A general direction to pay legacies out of a mixed fund of residue charges them rateably on the portions attributable to realty and personalty. So far as the legacies are payable out of the portion attributable to realty they are real estate, and must bear their own estate duty, notwithstanding a direction to pay 'testamentary expenses' out of the mixed fund."

In *Re Owers* the question arose whether the principle of the decision applied in the following circumstances: The testator by clause 6 of his will gave a legacy of £50,000 to D. By clause 8 he directed that as regards all legacies "the legacy duty payable in respect thereof shall be borne by my residuary estate". By clause 10 he gave his residuary real and personal estate to his trustees upon the usual trusts for sale and conversion; the clause then continued: my trustees "shall out of the moneys arising thereby or otherwise forming part of my estate pay my funeral and testamentary expenses and debts and the legacies bequeathed by this my will or any codicil hereto and make provision as aforesaid for the payment of any annuity so bequeathed and all duties free from which any legacies or annuities may be bequeathed". He gave the residue to charity.

The residuary estate, which was large, consisted of personal estate valued at £121,000 and of real estate valued at £270,000. This summons was taken out by the trustees of the will to have it determined whether the legacy of £50,000, being payable out of a mixed fund of real and personal estate, must bear its proportion of the estate duty attributable to real estate. It was strenuously argued on behalf of the legatee that *Re Spencer-Cooper* was wrongly decided; if, however, it were not, that the law had been changed

by the 1925 legislation and "testamentary expenses" now included estate duty on real estate.

The Court of Appeal has rejected both these contentions. It has held that the early authority was right, and further that the meaning of "testamentary expenses" has not been changed.

The joint effect of section 16 of the Law of Property Act, 1925, and of sections 2 (1) and 53 (3) (c) of the Administration of Estates Act, 1925, is that as between the deceased's personal representatives and the Revenue the personal representatives are accountable for the estate duty on real estate passing on the death but the burden of the duty falls where it would have fallen before the Acts became law. It followed that in this case the £50,000 must bear its proportion of the estate duty attributable to the real estate.

The difficulty arose in this case by the use of the words "free of legacy duty", and would have been avoided if the legacy had been given "free of duty", when the estate duty attributable to the proportion of the legacy payable out of realty would also have been thrown on residue.

It has also to be remembered that the same difficulty arises in the case of all classes of property which do not pass to the executor as such (*O'Grady* v. *Wilmot*, [1916] 2 A. C. 231), which have to bear their own share of the estate duty.

With regard to specific gifts of realty, as these have to bear a proportionate part of the estate as well as the succession duty payable on them, the formula to be used here has also to be "free of duty" or "free of all duties".

The foregoing instances might suggest that, both in the case of bequests and devises, if the draftsman makes the gift "free of all duty" the wishes of the testator have been carried into effect. This, however, is not so except in the simple case where there is one or more immediately vested gifts followed by a residuary gift to one person absolutely. If the draftsman is not more explicit as to payment of duties two difficulties may arise. First, if the personalty or realty is settled on several persons in succession, does the provision freeing the gift from duty extend to duties arising on subsequent deaths; and, secondly, out of what part of the estate is the duty to be paid?

Where property is settled the question of future deaths may be a complicated one. In the present state of uncertainty it seems clear that it is very unsatisfactory to throw duties of uncertain amount arising at some unknown future date on any other than the property in respect of which they have to be paid.

One might have thought that by now it would be clearly established whether a gift "free of all duties" did extend to

cover such future duties. This, however, is not the case. Lord Sterndale, M.R., in *Re Wedgwood*, [1921] 1 Ch. 601, summed up the matter thus : " I think it is settled that the words ' free of all death duties ' have no general meaning as applied to all wills, and that they must be construed according to the meaning given to them by the particular will under consideration. Two meanings were mentioned in argument : ' free of all death duties arising in consequence of my death ' and ' free of all death duties arising in consequence of the dispositions made by my will '."

In this case the testatrix had given certain settled legacies " free of all death duties ". The surviving executor by his summons raised the question as to the incidence of the legacy and succession duties which would become payable on the deaths of the respective tenants for life. The Court of Appeal held that the legacy duty payable on the death of the tenant for life would be payable out of the ultimate residue and the estate duty out of the corpus of the settled legacy. The ground for this decision so far as regards the legacy duty was that the liability to pay this duty arose on the testator's death, though payment might be postponed in the case of the reversionary legatees; the ground so far as regards the estate duty was that the direction to pay " free of all duties " was a direction which only applied at the time when the legacy was transferred out of the testator's estate and did not extend to future duty. In *Re Fenwick*, [1922] 2 Ch. 778, at p. 779, Sargant, J., said that *prima facie* " the words ' free of duties ', when used with regard to a fund and not expressed to be with regard to successive interests in the fund, or with regard to the interests of beneficiaries in the fund, would be satisfied by applying them to the duties which would be paid at the time when the fund was handed over, and need not be extended so as to include the duties which will be payable on a subsequent devolution, because it is the fund that is being dealt with and considered ".

In *Re Trimble*, [1931] 1 Ch. 369, a testator settled certain premises " free of all duties " and Bennett, J., held that the words only applied to the succession duty presently payable on the death of the testator and did not extend to the succession duty payable on the death of the tenant for life. These authorities show that the modern tendency is undoubtedly to limit a direction freeing a gift from " all death duties " to death duties arising on the death. It is, however, in each case a question of construction of the will as a whole, and the decisions in *Re Pimm*, [1904] 2 Ch. 345 and *Re Cayley*, [1904] 2 Ch. 781 are cases where, on the construction of the will, it was held that residue had to pay all duties to which

the testator's estate was liable by reason of the provisions of his will, the duties including the settlement duty.

In view of the difficulties which may arise if a fund has to be kept which should be adequate to meet future duties, it seems that in the case of settled gifts given free of duty the gift should be expressed to be "free of all duties leviable at my death". Where, however, there are a number of bequests and devises it may be convenient to have a special clause in the will dealing with death duties and expressly limiting the immunity conferred to duties leviable at the death.

It would seem, however, that in the circumstances of to-day it is desirable to reverse the policy of testators with regard to death duties and for the property given to each beneficiary to bear not only the legacy or succession duty payable in respect of it, but also its proportion of estate duty, as now happens in the case of realty if the testator does not expressly otherwise provide. It is now quite impossible to foresee what these duties will be in the future, and there does not appear to be good reason for throwing the entire burden of death duties on one class of beneficiaries except where the benefits taken by others are of trivial character. It would be convenient to insert a clause providing that

> "All personal estate bequeathed by this my will or any codicil hereto shall [save as otherwise expressly provided] in exoneration of the rest of my estate bear the estate duty [and all duties if any hereafter imposed by statute] payable on my death in respect of the same in the same manner in all respects as if such personal estate were real estate and further all interests in such personal estate shall bear or contribute towards such estate duty [and future duties if any] on the same footing."

The further question arises in connection with death duties, namely, as to the fund which is to bear these duties. Generally no provision is made as to this and the duties are left to be paid out of residue. This course is open to no objection where the residue is given absolutely to one person. Where, however, it is given to several persons there may be difficult questions of construction should the trusts affecting any share of residue fail with a resulting lapse. The question then arises whether the statutory order prescribed by Part II of the First Schedule to the Administration of Estates Act, 1925, is to apply, the duties being primarily payable out of the lapsed share. The answer to this question depends upon whether the testator has created a mixed fund for the payment of funeral and testamentary expenses and there is no undisposed-of share until these are paid, as in *Re Petty*, [1929]

1 Ch. 726; *Re Kempthorne*, [1930] 1 Ch. 269, when the direction overrides the statutory order; or whether the directions he has given as to these payments does not displace the order, as in *Re Lamb*, [1929] 1 Ch. 722; *Re Sanger*, [1939] 1 Ch. 238. The authorities are practically impossible to reconcile, and turn on very fine distinctions.

It must also be borne in mind that, if the testator wishes duties to be payable out of a particular fund, a mere direction so to pay them will not throw them on the fund to the exoneration of undisposed-of property : *Re Gordon*, [1940] W. N. 239.

To sum up, it seems that where gifts of substantial value are given free of duty the draftsman should consider whether it is not expedient to insert a clause in the will specifying the property out of which the duties are to be paid. Generally these duties should in the first place be payable out of a specified fund. It may be advisable, with duties constantly rising, to provide that should the fund out of which the duties are to be paid prove insufficient the balance of the duties must be borne by the legatees and devisees concerned. Such a provision would prevent the burden on the residuary legatees increasing beyond the sum contemplated by the testator.

THE MERITS OF REGISTRATION OF TITLE.

By E. O. Walford, LL.D., Solicitor.

The appearance of a separate volume of *Key & Elphinstone* (*a*) dealing solely with Registration of Title is a suitable occasion for an article dealing with registered land and the merits of registration of title.

Registration of Title.

It is time a word be said in praise of the Land Registry and its works. The writer has suffered for many years the incoming (and outgoing) tide of abstracts of title, good, bad or indifferent, short, medium or lengthy, and the responsibility of perusing with all possible (or impossible) speed abstracts and deeds of inordinate

(*a*) Key & Elphinstone's Conveyancing Precedents, 14th edition, vol. 3, "Registered Land" by Harold Potter, LL.D., of Gray's Inn, Barrister-at-Law, assisted by A. H. M. Hillis, of the Inner Temple, Barrister-at-Law, "War Time Precedents" by B. A. Bicknell, of the Middle Temple and Lincoln's Inn, Barrister-at-Law.

length with the object of sending forth on the same day a contract which shall not "damp" the sale but which shall protect the vendor adequately against all the weapons of a (presumedly) exacting solicitor intent upon torpedoing the contract if the purchaser should decide that he would like to recede from the contract after it has been entered into. Whatever risk there may be that even the absolute title conferred by the Land Registrar may vanish almost "overnight" (as it did in the *Chowood Case*), that risk is a risk of perhaps one in one hundred thousand. In any event it is not one which should (commercially or otherwise) disturb the vendor's solicitor. His not to reason why: his not to make reply to lengthy requisitions on title. Moreover, it seems very unlikely that the difficulty which arose in the *Chowood Case* could be repeated at the present day. Where boundaries are not clearly defined on the ground (which was the cause of the trouble in the *Chowood Case*) the Registrar insists that posts four or five feet high should be erected at all necessary points in order physically to establish the boundaries. The advent of persons armed with posts and agricultural implements for the trituration of soil is usually notice to at least three-fourths of the local population of the staking out of a claim. It is unlikely that such an activity will fail to reach the ears of any adjoining owner directly or through gossip at the local "Red Lion" (or other place within the meaning of certain Acts).

It is probably too much to hope—even if it is prudent for a conveyancer to express the hope!—that interests in land will ever be capable of transfer with the same simplicity as a pound of tea, or no matter how many pounds of stocks or shares.

The elimination of the unnecessary (if not soul-destroying) task of perusing pages and pages of abstracts and piles of deeds (undertaken over and over again by solicitor after solicitor during a long period of years) by the simple expedient of registering the land with "absolute" title should, however, be a matter for the singing of a "Gaudeamus".

An abstract of title certainly cannot be compared with a rolling stone, for the amount of moss which it gathers in comparatively short periods of time is often immense.

Time after time successive solicitors or their clerks peruse the same lengthy and lengthening abstract, and then spend weary hours examining the original deeds against it—that is, if they can trace all of them, which they are often unable to do. The cumulative waste of time which is involved in this process throughout each year must be enormous.

There must be very few conveyancers with substantial

experience of registered and unregistered conveyancing who would not prefer to handle four sales or purchases of property registered with an absolute title to every sale or purchase of unregistered property where the abstract of title was, say, twenty brief pages in length (*b*).

In every case in which it is found that the investigation of title is complex or lengthy, or both, it is submitted that the purchaser's solicitor should, after completion, at least inform the purchaser of the possibility of obtaining an absolute (or good leasehold) title and of the probable saving of time, expense and trouble upon any future dealing with the property which will result from such registration. Normally the purchaser will not realise in such cases that the lengthy work which his solicitor has had to carry out—with resultant delay—will have to be gone through with the same waste of time when the purchaser sells or mortgages the property if the property is not registered.

A New Work.

New prominence is given to the subject of Registered Title by an entirely new departure in connection with *Key & Elphinstone's Precedents*. For the first time this work consists of three volumes. The additional volume is devoted in the main to Registered Land, although mention should be made of the very useful collection of Wartime Precedents at the end of this volume dealing with Powers of Attorney, Indemnity to Trustees in respect of the postponement of conversion, Landlord and Tenant (War Damage) Act forms, Mortgages, Change of Name, Partnership, Release and Wills, all prepared by Miss B. A. Bicknell, whose name is well known to readers of *The Conveyancer*.

It is, however, with Registered Land that we are concerned here. Dr. Harold Potter is responsible for the main volume (some 584 pages) dealing with registration of title.

The author has inserted many new forms in this work. His view appears to be that the place in which to deal with matters relating to registered land is in a document which is intended to be registered at the Land Registry. In some cases no entry made by the Registrar would record or reflect the provisions of the deed, and it is partly for this reason and partly owing to the objection to referring expressly or implicitly to documents or matters off the

(*b*) The writer is aware of a case in which the examination of the deeds upon a small purchase occupied two days. One of the deeds produced during this performance was 500 pages in length, half an hour being occupied in "finding the place"!

Register and with which a purchaser, mortgagor or lessee would not be concerned that practitioners have normally inserted in Land Registry forms only matters which will be duly recorded on the Register affecting the title in question.

Another fear of practitioners is that matters of this kind will eventually get overlooked as not all practitioners (or clients) are careful to keep copies of transfers or other Land Registry forms with the Land Certificate or Charge Certificate relating to the title. On the other hand, separate documents covering such matters *are* usually placed with the deeds or otherwise preserved. However, it is a matter of balance of convenience, and it may be that practitioners will find Dr. Potter's recommendations are an improvement upon the existing practice.

Dr. Potter rightly observes in the Preface to Vol. III of *Key & Elphinstone* (p. iv) that "the problems of covenants for title, indemnity covenants in respect of existing incumbrances, and other such matters have received little attention at the hands of the practitioner because they do not concern the form of the Register". If this is correct, Dr. Potter performs a public service in mentioning the point. In that connection he refers to *Cator* v. *Newton*, [1940] 1 K. B. 415; [1939] 4 All E. R. 457 (C. A.). There a positive covenant by A on the occasion of his purchase had been noted on the Register. (The writer is not clear that it ought to have been so noted.) A then sold the property to B; but the transfer to B contained no covenant by B to perform the covenant. It was argued that the effect of section 20 (1) of the L. R. Act, 1925, was to saddle B with the obligation to indemnify A against liability under his positive covenant.

In other words slavish adherence to stock Land Registry forms may well lead practitioners into errors. Dr. Potter's forms include one which contains an indemnity covenant (p. 434); and a reference to that form might suitably be included in a footnote on p. 421 to the form of "Transfer of Freehold" to prevent an oversight of the necessity for considering whether there are any positive covenants. The form of indemnity covenant is to the effect that the transferee "and his successors in title" are to indemnify the transferor against the covenants. If A, the transferee, sells, B, his successor in title, will not be liable to A's transferor in respect of A's positive covenants. Would A's liability cease on the transfer by A to B, or on his death, or would A's estate remain liable on his death? Possibly it would be preferable in such a case that A's covenant (in respect of positive obligations) should be for himself and his personal representatives, as A's assigns or successors

in title would not be bound by A's positive covenants. It was pleasing to see in the form of Second Charge (p. 525) a provision (often forgotten) enabling the second chargee to settle and pass the accounts of any prior incumbrancer and making a statement by such incumbrancer conclusive in favour of the second chargee or his assigns; but the words " and shall bind A B " [the proprietor] may not be acceptable to A B's solicitor unless it is stated that they do not prevent A B from raising objections *vis-à-vis* the prior incumbrancer, if his figures are incorrect.

Practitioners will find in this volume forms for almost every conceivable Land Registry dealing. It is, however, no mere book of precedents. It is divided into three parts—Parts I and II, comprising 370 pages, contain a full description of the principles and practice affecting registered land. The third Part (not actually called Part III) comprises some 213 pages of precedents.

Unwarranted Prejudice Against Registration of Title.

There appears to be little doubt that outside London and the compulsory registration districts some prejudice against the registration of title still lingers. In an endeavour fairly to weigh the position the writer has collected together such objections as might appear to be tenable. Commencing with inquiries addressed casually to practitioners, his experience has been that the only objections which can be taken seriously are :—

(I) *That the practitioners in question do not like registered titles because they do not understand registered conveyancing.*

They may add that they have a very great fear of " overriding interests " which they quite rightly understand may still subsist " somewhere round the corner " notwithstanding the registration of the title. If asked which particular overriding interests would be more speedily or easily detected in the case of an unregistered title, they may reply : " Well, there are cases in which the registered title has been cancelled without compensation owing to such interests " (no doubt referring to *Chowood, Itd.* v. *Lyall*, [1930] 2 Ch. 156, and *Re Chowood*, [1933] 1 Ch. 574). But this ignores the fact that overriding interests may quite well exist in the case of unregistered land and that the registered proprietor would have been on an equally bad horse if the title had not been registered. The *Chowood Cases* are no condemnation of registration of title. The worst that can be said is that the phrase " State Guarantee " of title used in Land Registry publications perhaps suggests that

the guarantee is unqualified. If so it puts the position a little too high. Even so, an absolute registered title is far "the better horse" for the following reasons, amongst others :—

(1) The holder of an unregistered title has no guarantee of the title whatsoever, and must prove his title in a much more complex manner.

(2) If an absolute title is challenged and the registered proprietor defends the case with the consent of the Chief Land Registrar, his costs can be included in any compensation paid to him if his registered title should be cancelled: L. R. Act, 1925, s. 83 (5) (c). The holder of an unregistered title will have no such backing. He must stand or fall alone.

And if the claimant is entitled to require the absolute title of A to be cancelled it may be taken as certain that if A's title were unregistered it would be held to be bad, and as practically certain that if A had investigated his vendor's title and taken a conveyance without registration of the title (and without being required by law to register the title) A would have been in no better plight.

In other words, these overriding interests, such as easements, rights of parties in possession and the like, constitute exactly the same menace in the case of unregistered land as in the case of registered land.

(II) *That the costs allowed are insufficient in the case of registered land.*

This is not really an objection to the system of registration of title at all; but it is useless to ignore such an argument. The answers to it are :—

(1) That if the landowner will benefit by the registration of title, *e.g.*, by the simplification of the deduction of his title, the speeding up of dealings with the property, and the decrease of costs upon a resale or mortgage, it is the solicitor's duty to recommend that the title be registered.

(2) That the Land Registry scale of remuneration is quite reasonable having regard to the substantial decrease in the work of deducing title which results from the registration of property with an absolute or good leasehold title, except in rare cases where there has perhaps been only one dealing with the property since the date of the deed forming the root of title.

If an opponent of registration of title were at my disposal I should be tempted to deal with him as follows :—

(1) Provide him with an abstract of title and deeds of

considerable length with instructions to peruse them and to settle a contract for sale, which would be found to necessitate the insertion of, say, six lengthy conditions concerning highly technical flaws in the title.

(2) Confront him also with a conveyancing solicitor of the most argumentative and difficult type (if any such there be !), who would during a period of two or three weeks indulge in lengthy discussions concerning the necessity for and wording of the said conditions and all or any of the other conditions. After exchange of contracts the purchaser's solicitor would then find six further alleged technical faults in the title and debate them *ad nauseam*, until such time as his client had decided that he did not really want the property after all. Whereupon, after taking the advice of counsel, it would be found that at least one of the technical objections taken was sufficient to prevent the vendor from obtaining a decree of specific performance. The title would then be presented to the Land Registry in the hope (which would turn out to be justified) that an absolute title would be granted; whereafter the purchase would be completed. I would then ask my opponent if he recognised the merits of registration of title.

(3) I would then present my opponent with the task of acting for a purchaser under a contract due for completion and which "absolutely must be completed" within fourteen days. The abstract of title would be upwards of thirty pages in length and it would be found that the deeds were thought to be in various places in Cornwall, Yorkshire and Essex. They would, however, prove not to be in any of those counties but in Northumberland, Sussex and "Who Knows Where". The "Who Knows Where" deeds would not be traced until the day before the fourteen days had expired. Meanwhile my opponent would have died of heart failure and I should not even be able to ask him whether he agreed that his difficulties would have been obviated if the property had been registered with an absolute title at the Land Registry.

Space does not permit of the examination in detail of the objections to compulsory Registration of Title which have been advanced before committees of county councils as set out in the Notes for County Councils considering Compulsory Registration (published by H.M. Land Registry). In most cases it seems impossible that they can have been raised by persons familiar with dealings in registered land; but one of them (perhaps compiled by

someone with a strong sense of humour) is so surprising that we reproduce it here.

> "*All objections to unregistered conveyancing on the score of its being old-fashioned and complicated are removed by the Law of Property Act*, 1925. [No mention here of the simple (?) Transitional Provisions in that Act or of the other statutes of that year, such as the delightfully simplifying Settled Land Act, 1925!] *The system under this statute is acknowledged by everyone* [*i.e.*, we may disregard anyone who does not agree!] *to be superior to registration of title.*"

There is more of this objection; but for ourselves, "C'est déjà trop". If "What is everybody's business is nobody's business", perhaps what is "everyone's opinion" is "nobody's opinion". But no doubt there are those for whom even legislative jungles hold no terror. To them the simplicity of transfer of registered land would be no attraction; but they are exceptional. The greatest good for the greatest number must in the long run prevail.

ADVANTAGES OF REGISTRATION.

(a) *General.*—The London County Council (after approximately thirty years' experience of compulsory registration) might be described as "satisfied customers" of the Land Registry. In 1929 a Report of the General Purposes Committee was made as follows:—

> "From the point of view of the Council, as purchasers, there is no doubt that as regards property already registered with absolute or good leasehold title, the work of investigation of title is very considerably simplified, and the legal costs payable by the Council are reduced. As regards the owner of land registration with absolute or good leasehold title gives to him a title which is State-guaranteed, facilitates a speedy transfer of the property, after the first registration cheapens the transfer of the property, and is in other respects advantageous."

And the London County Council recommended that, in the opinion of the council, an extension of the area in which registration of title to land is compulsory on sale so as to include properties in counties adjacent to London would be in the public interest.

(b) *Cases of destruction of deeds and abstracts by enemy action.*—At the present day there may be added to the advantages above referred to another advantage of overriding importance. To what extent the practice of keeping examined abstracts with the papers (and not with the deeds) is followed by solicitors it is impossible to determine without exhaustive inquiries. It is,

however, clear that in many cases the abstract of title is not placed with the deeds, but has to be procured from the solicitor when occasion arises. Where the solicitor's offices have been bombed and all his papers destroyed the effect is to close one channel through which the title can be verified. Sometimes it is impossible to carry the inquiry back to other solicitors owing to their ceasing to carry on business or to the loss or destruction of old papers.

Again, the deeds themselves may have been in the custody of solicitors or even in the private safe of the purchaser. Destruction by bombing may give rise to endless trouble, particularly where the purchaser has been fortunate or unfortunate enough to acquire on the completion of his purchase old title deeds relating to a large block of land. Thus the purchaser of the last plot of a large estate may take over the whole of the deeds relating to that estate, and perhaps those deeds may form the title for twenty or thirty years past to two or three hundred houses on the estate. If those deeds are destroyed it is obvious that it will no longer be possible to inspect the title deeds relating to a very large number of houses. It may be said that probably there will be a large number of examined abstracts "somewhere" which can no doubt be traced.

To this it may be replied:—

(1) That those who have endeavoured to trace such other abstracts in similar circumstances have not found it to be either a simple or a speedy job in practice. The writer has often wondered what does happen to all the abstracts which are prepared and examined but not placed with the deeds.

(2) That not all abstracts—or even examined abstracts—are perfect. Accordingly the inspection of the original deeds may often be necessary in order to clear up points which arise from faulty or incomplete abstracts, or in order to ascertain whether the fault lay in the original deed.

How different is the position where the title is registered at the Land Registry.

If the purchaser registers his title at the Land Registry the destruction of the land certificate is a matter of comparatively little moment. Without incurring very heavy expense the purchaser will be able to obtain a duplicate land certificate.

It is true that the destruction of the Land Registry records is possible, and that this would be a serious matter. Presumably

a very large number of irreplaceable records would be destroyed with it. On the other hand :—

(1) In many cases the registered proprietors (or chargees) would hold their land (or charge) certificates, and the Land Registry would be able to some extent to build up its records again from those certificates.

(2) The Land Registry would still exist as a body for gathering together all available information for the purpose of reconstructing its records and giving effect to further dealings with all possible expedition. In the case of unregistered land there is no such body. In fact, registration of title upon such evidence as could be gathered would be the obvious course to be adopted by an owner of unregistered land whose deeds had been destroyed. In some cases only a possessory title might be obtainable; but as this would normally lead in the course of time to an absolute title (or good leasehold title in the case of leasehold land) it would be desirable to effect the registration.

(3) The Land Registry would presumably give such publicity to the destruction of its records as would necessarily come to the knowledge of "the man in the street", and would probably evolve a scheme under which all persons interested as proprietors or chargees, or holding other interests noted on the register, would be called upon to file their claims to registration and in course of time the register would no doubt be built up again.

No such systematic building up of title would be available in connection with unregistered land.

In any case it is indisputable that the existence of two official records of the title is preferable to the existence of one set of title deeds, or, in many cases, one conveyance only without any certain knowledge as to the existence or whereabouts of the other documents necessary for the verification of the title.

In many cases where (unregistered) title deeds are destroyed the owner will find that far the best course is to submit such evidence of ownership as is available to the Land Registry and to endeavour to obtain an absolute or good leasehold title.

When these considerations are coupled with those mentioned at the commencement of this article it is submitted that the advantages of registration of title far outweigh any objections which can fairly be advanced against it.

APPROPRIATIONS AND ASSENTS.

In our March number (p. 212) the question of appropriations in respect of land in favour of a surviving spouse was considered, and it was suggested that, where the surviving spouse was one of the administrators, it would seem that he or she could not concur in the exercise of the statutory power of appropriation but that the consent of the beneficiaries interested in the intestate's residuary estate should be obtained. It was also suggested that, if a simple assent was executed in favour of the surviving spouse, a purchaser would not be concerned to go behind the assent and inquire into the equitable title of the surviving spouse.

Mr. Ernest Watson, LL.D., has now written questioning the first suggestion. He writes as follows :—

("The point is taken that by section 33 the real estate of an intestate is subject to a trust for sale and trustees cannot sell to one of themselves. It seems to me the answer to this may be given in a series of short propositions.

"1. It is unquestionable that the statutory power of appropriation applies to satisfaction or part satisfaction of a surviving spouse's £1,000 and interest or a pecuniary legacy under a will as to a share of residuary estate. Section 48 (2) (a) of A. of E. A., 1925, refers to appropriation in satisfaction of a surviving spouse's £1,000 and interest, and it is quite clear from the earlier part of that section that the legislation had in mind that the surviving spouse would ordinarily be one of the personal representatives.

"2. No one doubts that administrators remain personal representatives until the conclusion of the administration. They are, in fact, in the same position as executors to whom the testator has devised and bequeathed his estate upon trust for sale : *Re Yerburgh, Yerburgh* v. *Y.* [1928] W. N. 208; *Re Pitt, Pitt* v. *Mann* (1928) 44 T. L. R. 371.

"3. By section 2 of A. of E. A., 1925, the powers of personal representatives in force before the Act with regard to leaseholds are to have effect as regards realty.

"4. Even before the Act executors could appropriate to one of themselves. In *Re Beverly, Watson* v. *W.* [1901] 1 Ch. 681, quoted in the article, Buckley, J., referred to many cases in which executors had been held to be authorised to appropriate

pure personal estate in satisfaction of a share of residuary estate (a) where there was a trust for sale and (b) where there was not, and he held that the appropriations in that case were valid. There was there a trust for sale and conversion and there were appropriations of leaseholds in part satisfaction of the shares of two of the beneficiaries, one of whom was one of the executors and trustees. The principle, which, according to the article now being criticised, would prevent an appropriation by a surviving spouse and another administrator in favour of the surviving spouse, would surely have equally applied to the appropriation in *Re Beverly* to the executor beneficiary.

" 5. There appears to have been a confusion of ideas between the law applicable to appropriation and the interpretation of the Stamp Act, 1891. The latter makes *ad valorem* stamp duty payable on a conveyance on sale, and the Controller of Stamps ruled that the words ' this section shall not operate to impose any stamp duty in respect of an assent ' in section 36 (11) left the law as it was before the Act, and accordingly that an assent in satisfaction or part satisfaction of a pecuniary legacy or a surviving spouse's £1,000 (except where the whole residue did not exceed that figure) must be treated as a conveyance on sale. *Jopling* v. *C. I. R.* [1940] 2 K. B. 282 has confirmed that ruling. The distinction drawn is that a pecuniary legatee or surviving spouse is entitled to a definite sum, which he or she gives up in return for a specific part of the estate; it is in fact a conveyance in consideration of a debt under section 57 of the Stamp Act. On the other hand, a person entitled to a share of residue, although he or she takes the property appropriated at a valuation, is not acquiring the property on sale because no money passes and no specific sum to which the person was entitled is released.

" The writer of the article suggests that if there are two documents, one of which bears *ad valorem* stamp and the other being a plain assent under hand, a purchaser will be protected because section 36 (7) says that the assent may be taken as sufficient evidence that it is made in favour of the person entitled to the legal estate. With all respect I submit that this quite begs the question of stamp duty. It is fairly clear that the draftsmen of the Act did not realise that sub-section (11) was worded so as to create trouble. I put forward the suggestion that in every case of an assent by administrators in favour of a surviving spouse a purchaser is entitled to say ' the presumption is that this is in satisfaction or part satisfaction of the £1,000 charge and an additional duty must be affixed or the assessment adjudicated free of duty '. I will go further and say that in case of an assent by

executors a purchaser is justified in perusing the will to see if the assentee is merely a pecuniary legatee, and if it appears that he is a question as to stamp duty is justifiable and must be answered by the vendor.")

Messrs. Marcy, Hemmingway & Sons, who originated this discussion, and Messrs. Burton & Dyson have also written suggesting that as a purchaser will inspect the grant of administration and see that the estate exceeds £1,000, he will be put on inquiry and have notice that the assent in favour of the spouse was in fact an appropriation, with the consequence that he must see that the appropriation was good and duly stamped.

The issue is, perhaps, not quite so clear as it appears at first sight. Dr. Watson suggests in paragraph 2 that no one doubts that administrators remain personal representatives until the conclusion of the administration, and cites appropriate authorities. This is so, but the difficulty, which is not covered by authority, is the date at which the administration ceases and the trust begins. *Re Beverly* (*supra*) (distinguished in *Re Cooke's Settlement*, [1913] 2 Ch. 661) deals with the right of personal representatives to assent to themselves, and is protected (apart from any interpretation of A. of E. A., s. 48 (2) (a)) by A. of E. A., s. 41 (6), since presumably this is a power of appropriation conferred by law independently of the section. But these authorities do not touch the question whether an appropriation in respect of £1,000 is made in the character of personal representative or as trustee. In *Re Pitt* (*supra*) it was held that an administrator who has completed administration can appoint a new trustee by deed, which assumes that at some stage an administrator may become a trustee *simpliciter*. That is to say, the administrator does not remain a personal representative until he has distributed the whole of the intestate's estate.

Now, under A. of E. A., s. 46 (1), the residuary estate stands charged with the payment of the net sum of £1,000, and subject thereto upon "trusts" which vary according to the character of the beneficiaries entitled. Whether this charge of £1,000 can properly be described as part of the "trusts" of the residuary estate is arguable, but since it forms part of the beneficial interests in the residuary estate there is a good deal to be said for the construction that it does. All these "trusts" clearly take effect behind the trust for sale created by A. of E. A., s. 33. Assuming, therefore, that in other respects the administration is complete, would it not be proper to say that the administrators have become trustees *simpliciter*? To assume otherwise appears to demand the proposition that the administrator can only become a trustee after

he has assented to himself as such, but this may be inconsistent with *Re Pitt* (*supra*). If that is correct it seems doubtful whether in such circumstances the administrator would have any power to appropriate under *Re Beverly* (*supra*), since he would not be acting as administrator but as trustee. It really depends upon whether an administrator can only become a trustee of land after he has assented in writing to himself, but even since 1925 an assent by conduct has for some purposes been held to exist. However, it not infrequently happens that an appropriation is made to meet the £1,000 charge prior to completion of the administration. It therefore presents the difficulty of title; (i) is there a power of appropriation and (ii) is the appropriation properly stamped?

The contention of Dr. Watson and his fellow correspondents that in the event of an intestacy a purchaser is concerned with the beneficial interests behind the trust for sale requires careful consideration. *Prima facie* such a contention would appear to conflict with A. of E. A., s. 36 (7), which makes an assent or conveyance by a personal representative sufficient evidence that the beneficiary named was legally entitled to the property. If a purchaser is entitled to assume that the spouse was entitled, then there is no need to investigate the beneficial interests under the intestacy, and this might also apply to protect an appropriation! Unfortunately, perhaps, the protection of this section is not absolute, because it has been held that "sufficient" is not "conclusive" evidence: *Re Duce & Boots' Contract* [1937] Ch. 642. If, as in this case, by way of recital or otherwise there is something in the assent or conveyance to put the purchaser on inquiry, he must satisfy himself that the person to whom the assent was made is legally entitled. Now it is submitted that if the document purports to be by way of appropriation this may be sufficient to put the purchaser on inquiry to see that the power of appropriation still exists. We say "still exists" because, although there is probably, almost certainly, a power of appropriation before the completion of administration, it may be that such a power will have ceased to exist prior to the conveyance by way of appropriation. On the other hand, if there is a plain assent (*e.g.*, without recitals) it is suggested that this question does not arise. It is perfectly true that the value of the estate as shown by the letters of administration may exceed £1,000 value, and that might be regarded as being sufficient to put a purchaser on inquiry in view of *Re Duce & Boots'* contract (*supra*). The objections to this argument are twofold, and are brought out by Dr. Watson's own suggestion that in the case of an assent by an executor a purchaser is justified in perusing the will to see if the assentee is merely a pecuniary legatee. The primary objection

is one of general principle. The purpose of section 36 (7) was to keep all equitable interests off the title, and unless they are specifically brought on to it they should be ignored.

Secondly, even the existence of an estate above £1,000 does not necessarily show that the assent is by way of appropriation, because (a) the spouse might be entitled and (b) the sum returned for duty shown on the grant does not necessarily represent the true state of the estate; other liabilities might later have come to light. In view of the fact that section 36 (7) was passed to avoid the necessity of all these inquiries, it is thought that in the event of an intestacy a simple assent should be regarded as sufficient evidence without further investigation by the purchaser. Equally in the case of wills it seems that a purchaser should not read the will. It must be regarded as known to the Legislature that in any probate (which clearly forms part of the title : cf. *Re Miller & Pickersgill's Contract* [1931] 1 Ch. 511) the will is incorporated, and that, therefore, in making this provision in section 36 (7) it was intended to relieve the purchaser of any responsibility for the contents of the will. Such an attitude is consistent with the provisions of the whole of the 1925 legislation, and it is thought would be supported by the Courts.

It is submitted, therefore, that under a simple assent made in pursuance of an appropriation made in equity a purchaser would be protected without inquiry.

With regard to the question of stamp duty, it is clear that on an appropriation *ad valorem* duty is payable : *Jopling* v. *C. I. R.* (*supra*). On the other hand, there is no objection to this stamp being put on the appropriation agreed upon in equity, and of course this is a common practice in connection with trust instruments, a purchaser of the legal estate not being concerned. An assent as such does not attract any stamp duty : A. of E. A., s. 36 (11). In view of the fact that nothing should appear on the assent to attract inquiry, it is clear that no duty should be stamped on an assent, and it is contended that in view of the statutory provisions this is unnecessary. This view concerning stamp duty may give rise to some question in view of the recent, and somewhat disconcerting, decision in *Re Robb's Contract* [1941] (*post*, p. 296). An assent is clearly a disposition of property and purports to be voluntary, though if it is made in pursuance of an appropriation, it is for the purposes of stamp duty made for valuable consideration. It is suggested that in law an assent made by way of appropriation is not a voluntary disposition within section 74 of the Finance (1909–10) Act, 1910, and it would certainly be a surprise if the principles of the decision were applied to assents

generally, which, of course, usually are transfers operating *inter vivos* and as a voluntary disposition.

In conclusion we should add that this interesting discussion, for which we are indebted to our critics, really arises out of the question of conveyancing method. We think that we have said enough to show that in certain circumstances there may be a doubt, though perhaps only a doubt, about the existence of a power to appropriate. It will therefore be convenient, at least in some cases, to obtain the consent of beneficiaries to an appropriation to avoid question arising at a future time. It is manifestly inconvenient to raise any questions on a title if they can be avoided. To avoid such questions the conveyancing method that can universally be adopted is that of an appropriation in equity followed by a simple assent to the legal estate, which is the only document to appear on the legal title after the grant of administration. In effect this seems to be the appropriate method of making an appropriation wherever executors or administrators have power and make an appropriation to themselves, though its convenience is peculiarly adapted to the case of a spouse who is an administrator.

A SHORT INDEX TO EMERGENCY REGULATIONS.

(*Continuing the Index on pp.* 96—100, *ante.*)

ALLOTMENTS.

The power conferred upon a local authority to cultivate land by Regulation 62A, para. 1 (*c*) is extended to any land which the authority is authorised by the possessor to use, and such authorisation may be given notwithstanding any Act, trust or restrictive covenant (1941 No. 456).

BONDS, SHARE-WARRANTS, ETC.

No person, except with Treasury permission, may so alter any bond, share-warrant or other document of title relating to securities that the title to or any interest in securities becomes transferable by the delivery of the bond, etc., as so altered (1941 No. 474).

BUILDING.

Amendments are made to Regulation 56A (which forbids private building operations) by 1941 No. 437, para. 4.

COMPANIES.

Power is given to apply funds by way of loan to the Government free of interest (1940 No. 1884).

Capital Issues.—1940 No. 2187 exempts certain transactions from the provisions of Regulation 6 of the Defence (Finance) Regulations, 1939.

1941 No. 428 gives the Board of Trade power to relax obligations as to the holding of meetings and presentation of accounts.

HOUSES.

Regulation 68AB (1941 No. 50) provides for the application of compensation in respect of unused dwelling-houses held on a tenancy from week to week taken by authority for housing homeless persons.

POWERS OF ATTORNEY.

1941 No. 371 extends section 2 (1) and (2) of the Evidence and Powers of Attorney Act, 1940, to many of the British Colonies and protectorates.

NOTES OF RECENT CASES.

1. *CONVEYANCING AND REAL PROPERTY CASES.*

Hire-purchase—agreement for price to be discharged "on hire-purchase terms"—validity of contract.—Scammell v. *Ouston*, [1941] 1 All E. R. 14, is primarily a question of contract, but the judgments may be very important. It arose out of an agreement for the "sale" of a lorry, but the relevant document contained the clause: "This order is given on the understanding that the balance of the purchase price can be had on hire-purchase terms over two years." The House of Lords (overruling the Court of Appeal) held that there never was a concluded contract. Lord Russell put the point in these words (at p. 21): "Either (i) this term of the alleged contract is quite uncertain as to its meaning, and prevents the existence of an enforceable contract, or (ii) the term leaves essential contractual provisions for further negotiation between the parties with the same result." Lord Wright said (at p. 29): "The law has not defined, and cannot of itself define, what are the normal and reasonable terms of a hire-purchase agreement. Though the general character of such an agreement is familiar, it is necessary for the parties in each case to agree upon the particular terms. It may perhaps be that this might be done in particular circumstances by general words of reference. For instance, if it were stipulated that there should be 'a usual' hire-purchase agreement, the Court might be able, if supplied with appropriate evidence, to define what are the terms of such an agreement."

House-agent's commission—contract for sale not completed.—Luxor, Ltd. v. *Cooper*, [1941] 1 All E. R. 33, is a decision of first-rate importance, since it overturns the older law laid down in *Trollope* v. *Martin*, [1934] 2 K. B. 436, and subsequently followed in a number of cases. The short point is whether an agent who has introduced a purchaser on the terms prescribed by the vendor is entitled to a commission although no contract results unless the vendor has "reasonable cause" for refusing to complete the sale. The House of Lords have now held unanimously that this is not so. The introduction must result in ordinary circumstances in a

complete contract. So long as negotiations are pending the vendor is within his rights to refuse to complete the contract.

In the opinion of the learned Law Lords the term " without reasonable cause " was too vague to be capable of sufficient definition to be impliedly incorporated into the contract between the agent and the vendor. It is important, therefore, to observe that this decision, like that which it overrules, must not be carried too far, as was the tendency in connection with the earlier case. There is, of course, nothing to prevent the parties entering into an express contract that the commission becomes payable on the introduction of a prospective purchaser. Again, each contract must be looked at to decide its terms, and circumstances might be such that commission was payable on the basis of a *quantum meruit*: see *Prickett* v. *Badger*, 15 C. B. (N.S.) 296, much discussed in the instant case. The question, therefore, is very dependent on the exact contract, and the particular construction to be put upon it. The case should, therefore, be read in detail.

Compensation—Ribbon Development Act, 1935.—In *Gibson* v. *Norfolk County Council*, [1941] 1 All E. R. 252, the short point was whether a builder could recover as compensation the cost of building a service road which was the condition on which the local authority were prepared to allow him to build on land leased by him and abutting a trunk road. A Divisional Court held that under section 9 (4) of the Ribbon Development Act the limit of compensation was a sum equal to the difference between the market value of the estate or interest subject to the restrictions and not so subject to these restrictions. The case was peculiar in this respect, namely, the arbitrator had found the value of the interest to be £20 and the cost of the service road about £240. Consequently even had the cost of the road been allowed this would have made the value of the land subject to the restrictions to be expressed in terms of a minus quantity. The Court was not prepared to accept a proposition that something can have " a market value of minus a certain sum of money ".

It should be noticed that the case does not decide that the cost of a service road could never be recovered. Perhaps if the land had exceeded in value the cost of the service road it would have been possible to recover it as compensation. It should, however, be pointed out that this point may involve considerations not arising in the case noted.

Nuisance—snow falling from the roof—act of God.—In *Slater* v. *Worthington's Cash Stores*, [1941] 1 All E. R. 245, the plaintiff was waiting for her mother outside a shop and in the highway when snow, which had gathered on the roof, fell on her and did her considerable injury. The snow was the result of the worst storm for many years, but had been on the roof for four days before the accident. The defendants had taken no steps to remove the snow, nor to warn members of the public against standing under the roof. Oliver, J., held that the snow constituted a public nuisance, that the defendants having notice of its existence were liable to remove it although they had not authorised its presence, and consequently were liable to the plaintiff.

The defendants had pleaded that they were not liable, *inter alia*, because the landlords were responsible for doing repairs. The learned Judge held that this was no defence and cited with approval the *dictum* of Scrutton, L.J., in *St. Anne's Well Brewery* v. *Roberts* (1928), 140 L. T., at p. 7: "I think also it is clear law that the person liable for a nuisance on premises is certainly the occupier."

Oliver, J., also held that the defendants owed a duty of care to members of the public using the street to safeguard them from the danger occasioned by the snow either by removing it or by some other effective means, such as a warning. He also held that an exceptionally heavy snowstorm was not an act of God, following *Greenock Corpn.* v. *Caledonian Ry.*, [1917] A. C. 556 (an exceptionally heavy rainfall), but in any event it would not have been a defence because it was not the snowstorm but the failure to remove the snow which was the cause of the accident.

Conveyance to trustees—stamp to be adjudicated—voluntary conveyance.—*Re Robb's Contract*, [1941] 2 All E. R. 200, will probably come as a shock to most conveyancers. The question was raised on a vendor and purchaser summons arising out of a requisition that a conveyance to trustees on trust for sale, the proceeds of sale to be held on trusts contained in another instrument, must have the ordinary 10s. stamp adjudicated. No doubt the particular requisition arose because the trusts were not expressed to be contained in a deed of even date but were to be declared in a deed of subsequent date. No doubt the purchaser argued that such a deed might not have been lodged and duly stamped. In fact, however, the decision is on the general point. Simonds, J., held that the language of the Finance (1909–10) Act, 1910, s. 74 (2),

is comprehensive and requires such a conveyance to be stamped either *ad valorem* or with an adjudication stamp. The sub-section says that "any conveyance or transfer operating as a voluntary disposition *inter vivos*" shall not be deemed to be duly stamped without the adjudication stamp. The learned Judge held that the present conveyance was a voluntary conveyance, and he referred to section 74 (6), which includes conveyances to new trustees or on retirement of a trustee or under which no beneficial interest passes, all of which are excluded from liability for duty under the section.

It would appear that the effect of this decision on stamping practice will be considerable. Assuming that all the cases mentioned in section 74 (6) are within the "comprehensive" provisions of section 74 (2), wherever any instrument within that sub-section operates as a transfer of property it must be stamped as well as any other voluntary conveyances which do not for any reason attract duty. For example, any appointment of a new trustee which, though impliedly, contains a vesting declaration will apparently require an adjudication stamp. Actually this is not so absurd as it sounds. Where, for example, A and B are joint tenants in trust for sale for themselves in equal shares one method of making a conveyance by B to C of his share would be simply to retire from the trust in favour of C and so far as the legal estate is concerned this would be adequate, while a contract signed over a sixpenny stamp would, for valuable consideration, be sufficient to protect C's interests in equity. Such a transaction would not be adequately stamped unless the appointment of a new trustee was stamped *ad valorem*, or so it would seem.

Section 74 (2) is rather peculiarly worded. It provides that the Commissioners *may* be required to express their opinion on any voluntary conveyance operating as a voluntary disposition and no such conveyance shall be deemed to be duly stamped unless the Commissioners have expressed their opinion. Presumably this must mean that any conveyance purporting to operate as a voluntary conveyance must be stamped with an adjudication stamp. The learned Judge held that the documents mentioned in section 74 (6), which includes appointments of new trustees, or conveyances under which no beneficial interest passes, or made to a beneficiary by a trustee, or a disentailing assurance, are not outside the section altogether. He did not offer a definition of a conveyance operating as a voluntary disposition, but it becomes obvious that the documents must operate as a disposition. For example, does an appointment of new trustees under the Settled Land Act require to be adjudicated? The land does not, of course, vest in

the new trustee but remains in the estate owner. On the other hand it is conceivable that there may be capital moneys under the settlement which would vest in the trustee by means of the vesting declaration. This, however, does not appear to affect the deed of declaration made under the Settled Land Act, s. 35, which relates only to the land and does not operate as a conveyance or transfer of the land. Hence so far as the legal title to settled land is concerned it is submitted that this decision does not apply. On the other hand an appointment of a new trustee of a trust for sale would appear to fall within the provisions by reason of the implied vesting declaration.

The difficulty that now confronts practitioners can be exemplified by assents. Nothing in A. E. Act, s. 36, operates to impose stamp duty, but does that exclude a duty payable on a transfer *inter vivos*—and an assent is a transfer of the legal estate *inter vivos* from the personal representative to the beneficiary. The writer has no doubt that an adjudication stamp is not necessary, but it is submitted that on the literal interpretation of A. E. Act, s. 36 (11), there is nothing to exclude it. What practitioners must have is a definition of the cases to which this decision does apply.

Since stamp objections in documents later than 1888 cannot be excluded by condition it is suspected that this decision may give rise to some difficulty in practice. It is thought that many documents falling within the purview of this decision may not have been adjudicated and been accepted by a purchaser who may experience some difficulty in obtaining the necessary stamping. Unfortunately it is not a defect that can be cured until time makes the document no longer within the period of length of title.

Rectification — mistake — burden of proof — "free of tax". — *Fredensen* v. *Rothschild*, [1941] 1 All E. R. 430, deserves careful consideration because it arises out of the burden of proof where a claim for rectification is made against personal representatives. By a deed dated July 5, 1907, the grantor covenanted to pay during the life of the grantee and her child Alice and the survivor of them "the clear yearly sum of £550". The grantee's life interest was without power of anticipation and was a protected interest on the sum becoming payable to any other person. It was common ground that the expression "the clear yearly sum" did not throw upon the grantor the burden of income tax. During his life, however, the grantor did in fact pay the sum without deduction of tax and indeed also paid the rent of the flat in which

the grantee lived. The grantor died in 1937 and the grantee applied for rectification of the deed on the ground that the grantor and grantee had intended that the sum should be paid without deduction of tax. The only available evidence was that of the grantee, who gave oral evidence of conversations that took place at the date of the negotiations for the deed, and that of the practice in fact followed by the grantor. The learned Judge said of the plaintiff's evidence (at p. 435): "I want it to be understood that I am not saying that I disbelieve the plaintiff, but that by her evidence she has not satisfied me beyond fair or reasonable doubt, as she must do, that those words, [*i.e.*, 'You are to have a sum of £550 free of tax', or 'clear of tax'] or words to that effect, were used." As a result of this finding of fact and adopting the principle in *Fowler* v. *Fowler* (1859), 4 De G. & J., at pp. 264, 265, cited in *Banks* v. *Ripley*, [1940] Ch. 719 (noted *ante*, p. 144) Bennett, J., held that the application must fail because the oral evidence was insufficient and the acts of the grantor were not enough to support the grantee's contention.

His Lordship then went on to say that even if the words "free of tax" had been used the result would not, in view of the authorities *Jervis* v. *Howle*, [1937] Ch. 67; *Burroughes* v. *Abbott*, [1922] 1 Ch. 86, have been what the grantee contended it was intended to mean, namely, that the grantee should have £550 no more and no less. As a result there would have been no real agreement between the parties by the use of the words "free of tax", but it would have been necessary to arrive at a different formula, namely, that suggested by the Court of Appeal in *Re Maclennan*, [1939] Ch. 750. On that ground also the learned Judge would have been prepared to refuse the application.

Compulsory purchase—compensation for disturbance—Acquisition of Land Act.—The Court of Appeal has reversed the decision of first instance in *Horn* v. *Sunderland*, [1941] 1 All E. R. 166, by a decision which examines the basis of value for compensation for land acquired under the Acquisition of Land Act, 1919: see [1941] 1 All E. R. 480. In this case the owner of the land used it for purposes of farming, largely in connection with pedigree horses, but the land was in an area which made it suitable for building purposes and it could have been sold as such. The award of compensation was in a lump sum, but contained a statement that no sum was included as compensation for disturbance because the arbitrator fund that the sum assessed

could not be realised by a vendor unless vacant possession was given to the purchaser. Atkinson, J., had held that the rules for assessing compensation were governed by rule 2 and by rule 6. Rule 2 makes the value dependent upon the amount which would be obtained in open market, and rule 6 provides that rule 2 shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of the land. As a result he found that the arbitrator must award a sum for loss of disturbance. The Court of Appeal (Goddard, L.J., dissenting) decided that no sum for disturbance was to be assessed where the land had been valued as building land. The reason was that the occupation disturbed was carried on on agricultural land but the land assessed for compensation was treated as building land. The owner, therefore, could not obtain compensation in respect of agricultural land, namely, for disturbance, when he was claiming compensation in respect of building land—the two claims were in fact inconsistent. In order that the land could be treated as building land it was clear that it must be treated as land of which vacant possession could be given. Goddard, L.J., in his dissenting judgment took the view that the attitude of the majority was to ignore rule 6 and that this was incorrect.

In the course of his judgment Greene, M.R., pointed out that the statement in *Cripps on Compensation* (8th ed.), p. 271, on the effect of *Mizen Bros.* v. *Mitcham U. D. C.* (unreported but a transcript of which was before the Court) was inaccurate. But the Court was willing, at the owner's risk as to costs, to refer the matter back to the arbitrator to reconsider on the basis of valuation as agricultural land, with compensation for loss of business and for loss of mineral rights.

There was also an appeal on refusal of the Court of first instance to set aside the notice to treat as inadequate in description. This cross-appeal was dismissed and involved no point of law, as it was held that there was no misdescription.

Emergency legislation—mortgagor under no personal liability—leave to realise the security.—Franklin v. *Midland Bank, Ltd.*, [1941] 2 All E. R. 135, must be read in connection with *Re National Provincial Bank, Ltd.*, [1941] 1 All E. R. 97 (noted *ante*, p. 217), and considerably modifies that decision, in which it was assumed that, because a mortgagor was not under any personal liability and, therefore, could not claim any relief under the Courts (Emergency Powers) Act, 1939, s. 1 (4), it was not

necessary to obtain leave of the Court before exercising the remedies available to him. In the instant case the mortgagor was a surety who mortgaged certain property as security for the debt of the principal debtor, but under the peculiar wording of the mortgage it was held as a matter of construction that he was under no personal liability. Morton, J., held that as the mortgagor was under no personal liability he could claim no relief in respect of section 1 (4) of the Act on the ground either of his own inability or the inability of the principal debtor to pay the debt by reason of the war, thus following *Re National Provincial Bank, Ltd.* (*supra*). But he also held that it was necessary before proceeding to take any remedy to realise the security that leave of the Court should be obtained under section 1 (2) of the Act and, consequently, proceedings would have to be taken, thereby enhancing the cost of the realisation.

The learned Judge expressed the opinion that this was a *casus omissus* and as such might cause considerable hardship. What he did not make clear was what circumstances, if any, would justify the Court in refusing to give leave to realise the security. The real purpose of the necessity of obtaining leave would seem to be to give the Court an opportunity of affording relief where failure to meet the obligation was due to the war. If the Court has no power to grant such relief it does appear to impose an unnecessary burden on both the mortgagor and the mortgagee that leave must first be obtained.

Emergency legislation—Courts (Emergency Powers) Act, 1939, *and Possession of Mortgaged Land Act*, 1939, *do not bind the Crown—Agricultural Credits Act*, 1923—*compensation under the Defence Act*, 1939.—*Re Hutley's Legal Charge*, [1941] 2 All E. R. 141, decides for this purpose a short but important point, namely, that the Crown is not bound by the Courts (Emergency Powers) Act, 1939. The doubt arose, although the Crown is not mentioned in the Act, because of the decision of Rowlatt, J., in *Att.-Gen. of Duchy of Lancaster* v. *Moresby*, [1919] W. N. 69, where he held that the Crown was bound by the Courts (Emergency Powers) Act, 1917. Under the present Act Wrottesley, J., had already held that the Crown was not bound in the matter of arrears of income tax (*Att.-Gen.* v. *Hancock*, [1940] 1 K. B. 427), but that case was further removed from *Att.-Gen.* v. *Moresby* (*supra*) than the instant case, which Morton, J., held to be indistinguishable. In the absence of a full report of *Att.-Gen.* v. *Moresby* (*supra*) and on the general grounds of the law, Morton, J., decided to follow *Att.-Gen.* v.

Hancock (*supra*). The case arose out of a charge made under the Agricultural Credits Act, 1923, to the secretary of the Loan Commissioners under the Public Works Loans Act, 1875, and it was held that a loan made under the 1923 Act is to be deemed for all purposes to be a loan under the Public Works Loans Act, 1875. As a result the learned Judge held that the charge created a debt due to the Crown. Further, the secretary, having declared his intention of going into possession of the land charged, it was held that any money paid under the Compensation (Defence) Act, 1939, was payable to the secretary as secretary of the Loan Commissioners. This last decision may be of general importance to mortgagees and may be a ground for seeking to obtain possession if land is requisitioned and the mortgagor has failed to maintain his payments. Any mortgagee who contemplates taking possession must remember that his right to do so is dependent upon the provisions of the Possession of Mortgaged Land Act, 1939, which severely restricts the right enjoyed independently of the Act.

Emergency legislation—failure to observe order for specific performance—forfeiture of deposit—leave of Court.—In *John Barker* v. *Littman*, [1941] 2 All E. R. 15, an order was made for specific performance which was not obeyed. It was admitted that under *Broadstairs Picture Houses* v. *Littman*, [1940] Ch. 860 (noted *ante*, *p.* 63), it was unnecessary to obtain leave to forfeit the deposit for failure to complete the contract, but it was argued that it was in the discretion of the Court to refuse an order for forfeiture of the deposit and that in considering the exercise of such discretion the Court should take into account the circumstances which would be regarded in an application under the Courts (Emergency Powers) Act, 1939. Bennett, J., held that if he had a discretion to make the order it might be proper for him to consider these circumstances, but the authorities—namely, *Hall* v. *Burnell*, [1911] 2 Ch. 551, and *Holford* v. *Trim* (1921), 65 S. J. 768—laid it down as an order to which the plaintiff was absolutely entitled and that, therefore, he could not take any circumstances into account. It was, in fact, not a discretionary order at all.

Emergency legislation — appointment of receiver by first mortgagee after appointment of receiver by second mortgagee—date of account.—In *Re Belbridge Property Trust, Ltd.*, [1941] 2 All E. R. 48, the simple question was the date at which the

receiver of a second mortgagee must account to a receiver for a first mortgagee when appointed with leave under the Courts (Emergency Powers) Act, 1939, and Uthwatt, J., held that the date was that of the summons under the Courts (Emergency Powers) Act. He held that the decision in *Re Metropolitan Amalgamated, etc., Ltd.*, [1912] 2 Ch. 497 applied, and that a first mortgagee was not to be prejudiced by delay in determining his rights, and this delay in the case of an application under the emergency legislation is presumably within this principle.

Emergency legislation — hire-purchase agreement — agreement to surrender article—leave of the Court.—Bowmakers, Ltd. v. *Tabor*, [1941] 2 All E. R. 72, is a case of the first importance at the present time to all concerned with hire-purchase. The hirer had failed to pay certain instalments when the agent of the vendor called on him. As the hirer had no suggestion of how he should meet these instalments the agent suggested that he had better return the car, the subject-matter of the agreement, and the hirer agreed and at the instance of the agent signed a document to the following effect: "I hereby declare that it is my desire voluntarily to determine the hiring under the above hire-purchase agreement and to surrender the vehicle concerned. . . ." The vendors, therefore, retook possession of the car and then sued for the unpaid instalments. The hirer defended the action on the ground that the vendors had agreed to release him from the instalments and counterclaimed for damages for taking unlawful possession because they had not obtained leave under the Courts (Emergency Powers) Act. The County Court Judge held that the defence failed, but awarded damages on the ground that the parties could not by agreement waive the necessity of leave under the Act, and held as a fact that the document did not amount to a surrender but to a retaking. The Court of Appeal upheld the County Court Judge and held that the parties could not by consent waive the necessity of leave of the Court. The defence of *volenti non fit injuria* cannot be pleaded as a defence to a statutory obligation: *Baddeley* v. *Granville* (1887), 19 Q. B. D. 423.

The County Court Judge had ostensibly followed *Soho Syndicate* v. *Pollard*, [1940] Ch. 638, but in that case Farwell, J., decided that it was not possible to contract out of the Act. The instant case was an attempt to avoid the effect of the Act by agreement between the parties and this was held to be equally invalid. Goddard, L.J., who delivered the leading judgment, also made it

very clear that it would not be possible to avoid the Act by bringing pressure on the hirer to surrender the article under any clause in the hire-purchase agreement, such as existed in the instant case. The learned Judge said (at p. 78): "Where a hirer has paid a substantial sum by way of instalments, the number of cases in which, owing to temporary embarrassment caused by war conditions, he will really be willing to forgo the benefit of all that he has paid must, we think, be very small. If such a case came before a Court, we think that it would be the duty of the Court to ascertain whether the return of the chattel was really and truly the *bona fide* exercise of the option given by the clause or whether in truth it was no more than a submission by the hirer to the owner exercising his right to seize."

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2. *LANDLORD AND TENANT CASES.*

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Landlord's liability in respect of lift retained in his possession and control—Haseldine v. *Daw* (1941), 57 T. L. R. 431.—It is settled law that when a landlord of a building let out in parts for flats or offices retains in his possession and control a common staircase giving access to the various demised premises, his liability towards a person not his tenant using the staircase for the purpose of reaching the premises of one of his tenants is that of an occupier towards a bare licensee, although the person using the staircase may in law be an invitee of the tenant to whose premises he is proceeding. The landlord's duty to such a person is not knowingly to expose him to a concealed danger or trap, but to warn him of any danger of that kind of which he (the landlord) actually knows : *Fairman* v. *Perpetual Investment Building Society*, [1923] A. C. 74. *Haseldine* v. *Daw* shows that the same principle applies in the case of a lift retained by the landlord in like circumstances, the landlord not being liable under this head of liability to a licensee who sustains an accident while using the lift in the absence of knowledge that the condition of the lift rendered it dangerous for passengers.

But under another head of liability the landlord owes a stricter duty to the tenant's visitor. For the lift is a vehicle in which the landlord carries the licensee as passenger, although making no charge upon the licensee for this service. With regard to conveyance in any kind of vehicle the person providing the conveyance

comes under a larger duty than that of merely not setting a trap. "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care": *Lygo* v. *Newbold* (1854), 9 Ex. 302, *per* Parke, B., at p. 305. This principle has been reaffirmed in *Harris* v. *Perry & Co.*, [1903] 2 K. B. 219, and applied in *Austin* v. *G. W. Ry.* (1867), L. R. 2 Q. B. 442; *Marshall* v. *York, Newcastle and Berwick Ry.* (1851), 11 C. B. 655; and *Christie* v. *Griggs* (1809), 2 Camp. 79. As Hilbery, J., says in *Haseldine* v. *Daw*, there is no material distinction between the case where a person undertakes the carriage of a passenger in a vehicle in the horizontal plane and the case where the passenger is carried in a vehicle designed to convey passengers in the vertical plane. The person who undertakes to carry the passenger, even gratuitously, assumes a duty to carry him with reasonable care. This duty includes not only reasonable care in the actual control and management of a passenger lift, but also such care in seeing that it is safe for passengers. Accordingly the landlord will be liable for breach of this duty if the facts are, as they were in *Haseldine* v. *Daw*, that circumstances were brought to his notice which should have caused him to inquire into the safety of the lift, although he was totally unaware that the condition of the lift rendered it dangerous to passengers. If he does not make that inquiry into the subject of the safety of the lift then he is not using reasonable care to provide a vehicle reasonably safe for the conveyance of the passenger.

The case of *Haseldine* v. *Daw* has, therefore, an important application wherever a landlord retains the control and management of the lift in a block of offices or flats.

Landlord and Tenant (War Damage) Act, 1939.—Several recent decisions under this Act may be noted.

Effect of notice to avoid disclaimer—whether landlord may subsequently apply for a declaration that the notice of disclaimer was of no effect because the land was never unfit.—It has been held in *Cooper* v. *Jax Stores, Ltd.* (1941), 57 T. L. R. 401, that where a tenant serves a notice of disclaimer under section 4 (2) (a) of the Landlord and Tenant (War Damage) Act, 1939, and the landlord thereupon serves a notice to avoid disclaimer under section 4 (5), the effect of the latter notice is to make the notice of disclaimer of no effect *ab initio* (section 11 (1)). It will be remembered that the notice to avoid disclaimer automatically

implies into the lease, by section 11, a covenant by the landlord to render the land " fit " within the meaning of the Act as soon as is reasonably practicable after the service of the notice to avoid disclaimer. Moreover, no rent is thereafter payable until the land is rendered fit in fulfilment of this implied covenant. Accordingly the landlord cannot subsequently make an application under section 6 (1) for a declaration that the notice of disclaimer is of no effect on the ground that the land comprised in the lease was not unfit by reason of war damage at the time when the notice of disclaimer was served. To permit the landlord to do this would in fact be allowing him both to approbate and reprobate, since his own notice to avoid disclaimer cannot have any effect whatsoever unless it is in answer to a notice of disclaimer served in circumstances of unfitness : see *per* Sir Wilfrid Greene, M.R., in *Cooper* v. *Jax Stores, Ltd., supra.*

Meaning of " unfit ".—In *Boudou* v. *Thornton-Smith* (1941), 57 T. L. R. 387, it has been laid down by the Court of Appeal that premises are " unfit " within the definition of that word in section 24 of the Landlord and Tenant (War Damage) Act, 1939, if some repairs need to be carried out before the building will be fit for the purpose for which it was used or adapted for use immediately before the occurrence of the war damage, even though the premises can be made suitable for their purpose by the expenditure of a comparatively small sum.

Rent payable in advance—effect of notice to avoid disclaimer.—In *Turner* v. *Stella Bond, Ltd.* (1941), 57 T. L. R. 395, the Court of Appeal considered the effect of a notice to avoid disclaimer in relation to rent payable in advance. Under section 11 of the Landlord and Tenant (War Damage) Act, 1939, one of the consequences of serving a notice to avoid disclaimer is that no rent is payable by the tenant under the lease in respect of the period beginning with the date of the service of the notice of disclaimer and ending with the date on which the land is rendered fit (sub-section (1) (b)). It has been held by the Court of Appeal in this case that the above provision applies where rent is payable in advance and that the landlord is not entitled to recover the proportion of rent which is in respect of the above-defined period.

The question did not arise in this case whether, if such proportion of rent had actually been paid by the tenant, he could recover it back from the landlord, but it seems clear on principle that he would be so entitled.

Landlord's implied obligation to keep low value dwelling-house in all respects reasonably fit for human habitation—Housing Act, 1936, *s.* 2.—By the Housing Act, 1936, s. 2, it is provided that in any contract for letting for human habitation a house at a rent not exceeding £40 in London or £26 elsewhere there shall, notwithstanding any stipulation to the contrary, be implied a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation: see *Woodfall* (24th ed.), p. 717.

In *Summers* v. *Salford Corporation*, [1941] 2 All E. R. 237, the tenant of such a house notified the landlords during the tenancy that one sash-cord of one of the windows was broken. Afterwards the other sash-cord broke while the tenant was cleaning the window and she was injured. It was held by a majority of the Court of Appeal (consisting of MacKinnon, L.J., and Stable, J., Luxmoore, L.J., dissenting), that the tenant had not established that the landlords had failed to keep the premises "in all respects reasonably fit for human habitation". The effect of the decision is most concisely stated by Stable, J., at p. 244, where he says: "I find it impossible to say, in my judgment, that so trifling a disrepair as a broken or defective window-cord rendered that room or any part of the house not reasonably fit for human habitation."

It will be noted that this majority decision of the Court of Appeal clears up the doubt left on this very point by the conflicting opinions expressed *obiter* by the members of the Court of Appeal in *Morgan* v. *Liverpool Corporation*, [1927] 2 K. B. 131.

Courts (Emergency Powers) Act, 1939—*whether assignment of lease since coming into force of Act and payment of rent by assignees creates a new contract of tenancy.*—In *Humberstone Estates, Ltd.* v. *Allen*, [1941] 2 All E. R. 100, a pre-war lease was assigned and the assignees paid some rent to the landlords before rent fell in arrear and the landlords obtained judgment in respect of two quarters' rent. It was contended that the landlords could levy

execution without leave of the Court being required under the Courts (Emergency Powers) Act, 1939, on the ground that the assignment of the lease and payment of rent by the assignees created a new contract of tenancy, which arose after the outbreak of war. This argument was rejected by the Court of Appeal. The assignees' debt for rent was under the original contract of tenancy, not under any subsequent agreement.

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3. *WILL CASES.*

By S. J. BAILEY, LL.M., Barrister-at-Law.

Administration — annuities bequeathed free of tax — estate insufficient to produce annuities from income—date of valuation of annuities.—There are many recent decisions upon the course to be adopted when the estate of a testator, who has bequeathed annuities by his will, is insufficient at once to pay any pecuniary legacies in full and to produce an adequate fund from the income of which the annuities can be met. The general rule of administration in such a case (see pp. 148—149, *ante*) requires the annuities to be valued, and sums representing their capital value (abated rateably, if need be, with each other and with any pecuniary legacies) paid outright to the annuitants concerned. Hitherto, however, there has been some uncertainty whether, when thus valued, the annuities should be valued as at the date of the testator's death or as at the date of the order. This may be a question of some importance: *e.g.*, if one of the annuitants dies after the testator but before the date of the order, or if the annuities were bequeathed free of tax and the rate of taxation changes. In *Re Ball, Lucas* v. *Ball*, [1940] 4 All E. R. 245, Farwell, J., held that the proper date of valuation was the date of the order he was then making, and that the resulting hardship upon the estate of an annuitant who (having outlived the testator) was now dead did not affect the matter. Up to the date of the order each annuitant would receive his due payments by way of annuity; and, where the annuity was bequeathed free of tax, the rate of tax (taking any allowances into account) ruling in the year concerned would naturally apply. As from the date of the order, however, the annuitants then surviving would each take a capital sum valued as at that date; and, in computing the capital sum payable in respect of an annuity bequeathed free of tax, the rate of income tax and the allowances (if any) would be those ruling

at the date of the order. This decision has since been followed by Simonds, J., in *Re Twiss, Barclays Bank, Ltd.* v. *Pratt*, [1940] W. N. 380; [1941] 1 All E. R. 93, where some of the tax-free annuities were deferred annuities payable to infants. "It is a general rule that, where the valuation of annuities is necessary, it should be made as at the date of the order" (*ibid.*, at p. 95).

Administration—assets of deceased—life policy taken out by father on life of child—death of father—whether policy held on trust for child.—There have been a number of decisions upon the question whether a life or endowment policy taken out by one person for the benefit of another constitutes the former a trustee of the policy. *Re Sinclair's Life Policy*, [1938] Ch. 799 (noted Vol. III, p. 100), is a comparatively recent illustration. There the deceased had taken out a policy on his own life for the benefit of his infant godchild, and Farwell, J., held that the policy-moneys payable at the deceased's death belonged to his estate absolutely. The latest case is *Re Webb, Barclays Bank, Ltd.* v. *Webb* [1941] W. N. 58; [1941] 1 All E. R. 321, where a father took out a policy on the life of his infant child, paid the premiums regularly, and died. Here, however, the same learned Judge held that the policy showed that the father held it as trustee for the child, and that at his death his personal representatives accordingly held it similarly as trustees. Curiously enough, the policy nowhere stated clearly that the father held it "as trustee"; and it is well established that a policy expressed to be taken out for or on behalf of a specified person does not of itself indicate a trust. Here, however, although the father was empowered by the policy to recover for himself a part of the premiums should the child die under twenty-one, the remainder of its terms were clearly intended to be for the child's benefit. These included an introductory statement that the policy was taken out "on behalf of and for the benefit of" the infant child, that the policy-moneys at maturity should be payable to the assigns or representatives of the child (unless he should die under twenty-one), and that various options should be exercisable by the father *on the child's behalf*. These together served to rebut the natural presumption that a person would be unlikely to wish to bind himself by contract to pay premiums on behalf of an infant of tender years. Such cases as this turn, of course, upon the true construction of the words used in the policy concerned.

Administration—intestacy—devolution of lunatic's real estate situate in Australia—Administration of Estates Act, 1925, *s.* 51 (2). —By virtue of subsection (2) of section 51 of the Administration of Estates Act, 1925, the foregoing provisions of that Act (*e.g.*, as regards devolution on an intestacy) do not apply to the real estate of a lunatic who, being of full age at the end of 1925, dies intestate after 1925 without having recovered his testamentary capacity; but such real estate "shall" devolve in accordance with the general law which was in force before 1926. In *Re Mackenzie* (*No. 1*), [1940] W. N. 359, the question arose whether this subsection was, on the special facts, applicable to real estate situate in Australia. Morton, J., in the light of the definition of "real estate" contained in section 55 of the Act ("means real estate . . . which by virtue of Part I of this Act devolves on the personal representative of a deceased person"—but note the possibility that section 52 might be construed as the governing section), held that it is inapplicable to land situate out of this country. In fact the Australian real estate here concerned had been sold, during the lunatic's lifetime, and the proceeds invested here in 3½ per cent. War Stock, pursuant to an order of the Court. The resulting fund, however, by virtue of section 123 of the Lunacy Act, 1890, had to be regarded for the purposes of devolution as though it were the real estate in Australia. Accordingly, on the death of the lunatic intestate, it devolved upon the persons entitled to real estate on intestacy under the law applicable in that part of Australia where the land lay.

Administration—legatee kills testator—rule of public policy—onus of proof of insanity.—In *Re Sigsworth*, [1935] Ch. 89, Clauson, J., was asked to determine the destination of the estate of a testatrix who had died leaving all her property by will to her only son Thomas. A coroner's inquest had returned a verdict to the effect that Thomas had murdered her and had feloniously slain himself. The learned Judge held that the rule of public policy which precludes a sane murderer from taking under his victim's will precludes him equally from taking under his victim's intestacy. He held further, however, that he could not accept the verdict of a coroner's inquest on the material questions of fact (*e.g.*, whether Thomas in fact killed his mother and whether he was sane at the time); nor, in the absence of the Attorney-General, could it be decided whether Thomas, assuming him to have been a sane murderer, should be regarded merely as outside the statutory list of beneficiaries on his mother's intestacy, or whether all her

other relatives were also excluded from the statutory list in favour of the Crown. In *Re Pollock, Pollock* v. *Pollock*, [1941] W. N. 66; [1941] 1 All E. R. 360, a wife died, having left all her property to her husband. The admissible evidence before Farwell, J. (the verdict of the inquest being inadmissible), in the form of affidavits, showed that on a certain date the husband killed the testatrix and killed himself. There was no evidence of the state of the husband's mind at the time. The learned Judge, however, held that one must assume in such a case, in the absence of evidence to the contrary, that the killing was felonious—*i.e.*, that the killer was sane at the time. This decision has obviously done something to protect personal representatives: for it appears to authorise them (as *Re Sigsworth* did not) to distribute on the assumption that neither the killer nor his representatives is entitled in such a case to benefit from the victim's estate. The precise destination of the victim's property under the resulting intestacy was again not indicated, save that the killer's estate takes nothing.

Construction—charity—trusts for religious purposes—trusts for purposes beneficial to the community.—A decision of Farwell, J. (noted *ante*, at p. 227) relating to charitable gifts has now been reversed by the Court of Appeal in *Re Ward, Public Trustee* v. *Berry*, [1941] 2 All E. R. 125. The gift in question was a residuary devise and bequest in favour of the Archbishop of Westminster, upon trust to devote the same forthwith in his absolute discretion "to the furtherance of educational or charitable or religious purposes for Roman Catholics in the British Empire". Farwell, J., in the Court below, had held on the authorities that "religious" purposes are not necessarily charitable, and that the gift accordingly failed for uncertainty. The judgment of Luxmoore, L.J., however, reviews the earlier cases in some detail, and concludes (at p. 133) that "a gift for 'religious purposes', if in those words, and if there is no other context, is a good charitable gift". The judgments of the other learned Lords Justices are to the same effect. With due respect, one would commend to the reader the judgment of MacKinnon, L.J., which is confined to the first principles enunciated in *Pemsel's Case*, [1891] A. C. 531, and solves the problem in a particularly refreshing if diffident fashion.

Another recent decision which turns upon the definition of a charity given by Lord Macnaghten in *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531, at p. 583, is that of Morton, J., in *Re Corbyn, Midland Bank Executor and Trustee Co., Ltd.* v. *Attorney-*

General, [1941] 2 All E. R. 160. This concerns the fourth head of that definition, namely, " trusts for other purposes beneficial to the community . . . not the less charitable in the eye of the law because incidentally they benefit the rich as well as the poor ". In *Re Corbyn*, *supra*, the testator had left all his property to form a fund to be held upon trust for training and educating selected boys to become officers " in His Majesty's Navy or the British mercantile marine ". Among the subsidiary terms of the trust was the provision for such boys of a monthly allowance of money " to enable him to keep up the dignity and appearance of an officer and gentleman ". The learned Judge therefore felt himself to be precluded from holding the trust to be one for the advancement of education within the meaning of the second heading of Lord Macnaghten's definition. He decided, however, that it fell within the fourth heading, set out above. Accordingly, although creating a perpetual trust, the gift was valid.

Construction—forfeiture clauses—forfeiture dependent upon a state of mind—uncertainty.—Any provision whereby a vested interest is to be defeated on the happening of some future event is required to be " such that the Court can see from the beginning, precisely and distinctly, upon the happening of what event it was that the preceding vested estate was to determine "—*per* Lord Cranworth, in *Clavering* v. *Ellison* (1859), 7 H. L. C. 707, 725. Thus in *Re Blaiberg*, [1940] Ch. 385 (noted Vol. IV, p. 443), a forfeiture clause to operate should a donee marry any person not " of the Jewish faith " was held to be void for uncertainty; for it was not clear whether an outward profession of the Jewish faith without mental adherence to it was intended to cause a forfeiture, and the Court cannot ascertain with certainty whether in fact a person continues to hold in his mind to a particular religious belief. This decision has now been followed by Bennett, J., in *Re Samuel, Jacobs* v. *Ramsden*, [1941] 1 All E. R. 539. Here the testator's will directed that if either of his children should contract marriage with a person who is not " of Jewish parentage and of the Jewish faith ", all benefits given by the will to that child or to the child's spouse or issue should determine as though the child in question had died at the date of the marriage. Although counsel urged that the above-mentioned decision in *Re Blaiberg* was against the current of authority, the learned Judge followed that decision and left such questions for a higher Court. The learned Judge, moreover, pointed out that even the stipula-

tion of "Jewish parentage" was of doubtful import: it might refer either to the race or to the religion of the parents or to both; nor was it clear whether this racial or religious test was to apply to one or to both of the parents of a spouse, nor at what point of time.

It would seem, from the decision of Farwell, J., in *Re Mylne, Potter* v. *Dow*, [1941] W. N. 57; [1941] 1 All E. R. 405, that these severe tests of certainty for clauses of forfeiture are not so strictly applied to a condition or description which operates *ab initio* (in the manner of a condition precedent) as an essential original qualification for a donee; and it may be observed that *Re Blaiberg, supra*, was itself founded upon a decision (unreported) of this same learned Judge. In *Re Mylne* the testatrix had bequeathed her residuary trust fund "for the benefit of such persons . . . who are or have been engaged in evangelistic work . . . as my trustees in their absolute discretion shall from time to time select . . . but so that no persons shall be eligible for any benefit under this trust unless he or she shall be a protestant in religion and a whole-hearted believer in the deity of Christ and the full inspiration of Scripture . . ." Farwell, J., held this trust to be charitable, being for the advancement of religion, and held further that the principle of *Re Blaiberg, supra*, did not invalidate the stipulation that the trustees should select only persons holding the specified beliefs. "In my judgment, it is possible for the trustees, by making inquiries, to ascertain whether a particular person is suitable. The condition may impose some difficulty on the trustees, but it is not one which it is impossible to fulfil. It differs from a forfeiture clause. It is merely a question of the trustees making a selection of a class of persons, and, so long as the trustees act honestly in this matter, and exercise their power fairly, no one can complain." This decision is no doubt consistent with the supposed rule that forfeiture clauses are more strictly construed than are ordinary words. It does, however, put the trustees in a difficulty, in that they are expected to be able to satisfy themselves (though only at the outset) as to the contents of a man's mind, whereas the Court has felt itself unable (at least in cases where a continuing state of mind is prescribed) to ascertain such matters.

Construction—gift to spinster "during widowhood".—The rule of construction *falsa demonstratio non nocet* enables the Court to ignore an inaccurate testamentary description of a legatee so long as his identity is otherwise clear from the will when read in the

light of the surrounding circumstances. It is thus apparent that a devise or bequest to a person whom the testator inaccurately describes as his "wife" does not necessarily fail, unless the testator's bounty was stimulated by a mistaken belief that she was in fact his wife. Thus in *Re Wagstaff*, [1908] 1 Ch. 162, a testator's bequest of the income of property for life to "my dear wife D. J. Wagstaff" was held by the Court of Appeal to be good, although (to his knowledge) at the date of their marriage ceremony she was in fact the wife of another man. Furthermore, in that case the fact that the income was given her for life "if she shall so long continue my widow", was held not to invalidate the gift; for the Court of Appeal was able to construe these words in a secondary sense as equivalent to "so long as she do not marry again". This latter point, it will be noted, involved not merely a defective description of the donee : for the words used prescribed widowhood both as a condition of the inception and as a measure of the duration of the gift. Accordingly the gift would have failed had not the words "my widow" been construed in a secondary sense. That this is so is evident from an earlier decision —*Re Boddington* (1883), 22 Ch. D. 597; (1884) 25 Ch. D. 685, C. A. There an annuity was bequeathed "to my wife Emily Caroline Boddington so long as she shall continue my widow and unmarried", and, after the date of the will, the testator's marriage with her was declared void *ab initio* on the grounds of his impotency. Here, both Fry, J., and the Court of Appeal held that the annuity was given to her for a period which could never come into existence; for she never did or could become the testator's widow. As was said by Cotton, L.J. (at p. 690), "in construing a will of this kind it is very seldom one can get any assistance from other cases except so far as they lay down principles"; and the guiding principle would appear to be that phrases such as "during widowhood", like other words and phrases, must bear their strict primary meaning unless the will, properly construed, justifies the Court in discerning (from the context or surrounding circumstances) some secondary sense in which the testator had used them. A similar question has now arisen in *Re Gale*, *Gale* v. *Gale*, [1941] W. N. 46; [1941] 1 All E. R. 329, where a testator left the enjoyment of a dwelling-house to a named lady "during her widowhood" together with an annuity "during her widowhood for a period of twelve years". He named her correctly in his will by her maiden names; and, although she was generally believed to be a married woman and customarily used her maiden names prefixed by the word "Mrs.", he was well aware that she had never in fact been married. Farwell, J., applied *Re Boddington*, *supra*, and held

that the gifts to her were for a period (widowhood) which could never come into existence at all and were therefore void. It may be that this decision went a little too far; for it was reached by construing the words "during her widowhood" as meaning the period during which she would be the *testator's* widow. Whether this limited construction was justifiable on the facts seems to be open to question; for the testator's will had in addition made effective provision for his lawful wife—described therein as such, and this might seem to negative any assumption that he contemplated the other lady as *his* prospective widow.

Probate—soldier's will—"in actual military service"—whether includes service in England—Wills Act, 1837, *s.* 11.—A learned article in an earlier volume of this journal (Vol. IV, p. 151) raised a number of important questions regarding the present law as to informal wills made by soldiers "in actual military service" within the meaning of section 11 of the Wills Act, 1837. The question, among others, was raised (at p. 155) whether the privilege of making informal wills is, as are the decided cases, restricted to service overseas. This matter has become of special importance in view of casualties which may be caused in this country by hostile aircraft. *In the goods of Gibson*, [1941] 2 All E. R. 91, has now raised the question whether an officer in the Army Dental Corps, living in his own house in this country and attached to Army headquarters in the vicinity, was entitled to the privilege of a military testament. He was killed in his house by a bomb during an air raid. In a brief judgment (at p. 92) Henn Collins, J., held that soldiers so circumstanced are not thus privileged on the authorities; that, were he to decide otherwise, every home guard would be entitled to make an informal will; and that the foundation of the privilege "is that a man is parted from civil surroundings", and the deceased never was. It may be that the decision also rests in part upon the following passage from the judgment: "a soldier who is carrying out peace-time duties, although he is under military authority, is no more a fighting soldier because he is in the Army than an ordinary civilian, who, in the circumstances of the present war, may be said to be in the front rank of the fighting". Yet it may well be that this passage was *obiter*, since it seems doubtful whether, on the authorities, the privilege can be said to be applicable only to a "fighting soldier".

Lapse—statutory exception under Wills Act, 1837, *s.* 33—*testator dies after* 1925—*beneficiary having died intestate before* 1926.—When section 33 of the Wills Act, 1837, protects a devise or bequest from lapse, the gift takes effect " as if the death of such person [the donee] had happened immediately after the death of the testator ". Nice problems sometimes arise when a devise or bequest to some child or other issue of the testator is thus saved from lapsing, which, it will be recalled, can occur only if that donee leaves issue of his own who outlive the testator. In *Re Hensler* (1881), 19 Ch. D. 612, for instance, a father devised land to his son, who predeceased him but left issue as prescribed by the section. For the purposes of this devise the son was therefore deemed to have died immediately *after* the father and so to have taken the land devised to him. Although the father was in fact residuary devisee under the son's will, Hall, V.-C., held that this residuary devise did not carry the land back to the father's estate. No reason was explicitly given for this part of the decision. But the words employed appear to be consistent with the argument of counsel for the successful party—that a fictitious lapse had intervened because (as stated above) the son was deemed by the statute to have outlived the father. A more recent problem on the same section was *Re Wolson*, [1939] Ch. 780 (noted *ante*, vol. 4, p. 104). Meanwhile it is probable that students of the law of property have often been required to contemplate the situation when a parent dies after 1925 having bequeathed property to his child whose issue outlive the testator but who himself has died before 1926 intestate. To this poser, *Re Hensler* (*supra*) appears to suggest that the child's estate, so far as concerns the property bequeathed to him by his parent, should be distributed according to the *modern* rules of intestacy; for (assuming that the child left issue of his own who outlived the testator) the bequest takes effect as if the child had died " immediately after the death of the testator "; and at our testator's death the new intestacy rules were in operation. In *Re Hurd, Stott* v. *Stott*, [1941] W. N. 30; [1941] 1 All E. R. 238, however, Farwell, J., has decided (on like facts) that this solution is not correct. Here the problem had in fact a double importance. A testatrix had died in 1939 having left property to her married daughter who had herself died intestate in 1923 leaving three children, one of whom (see the Weekly Notes report) was born out of wedlock but became legitimate by virtue of the Legitimacy Act, 1926. Consequently, the curative post-dating effect of section 33 of the Wills Act, 1837, raised two questions: (i) Did the pre-1926 or the new law of intestacy govern the ultimate distribution of the gift to the intestate daughter? (ii) Did the child legitimated by the

Act of 1926 take anything under that intestacy (by section 3 of that Act it could do so only if the intestate died after 1926)? The learned Judge held that the property must be distributed according to the law which was in force when the intestate daughter actually died. Consequently neither the new law of intestacy nor the new law of legitimation affected the matter. He reached this decision on the ground that section 33 of the Wills Act should be construed merely as operating to increase the intestate child's estate, "and does not change the persons who were entitled to the estate under the law which was in force at the time of the intestate's death". The report of this decision does not state what, if any, earlier decisions were mentioned either in argument or in the course of the judgment. But it would seem clear that in *Re Hensler* (*supra*) the section was in fact allowed to operate both to increase the donee's estate and to change the persons who would otherwise have been entitled to claim that increase from his personal representatives.

Maintenance — Inheritance (Family Provision) Act, 1938 — physical disability—conditional order for maintenance—dependant widower—domicil of deceased—children born out of wedlock.— There have been several reported decisions recently upon applications for reasonable maintenance under the provisions of the Inheritance (Family Provision) Act, 1938. *Re Pointer, Pointer and Shonfeld* v. *Edwards*, [1941] 1 Ch. 60, involved successful applications before Morton, J., for the maintenance of the widower and married daughter of a deceased testatrix, whose total "net estate" for the purposes of the Act was approximately £16,000. The widower (eighty-three years of age, with an income of £330 a year) was awarded the income of one-fifteenth of the residuary estate or 5s. a week whichever should be the smaller, such payments to cease as required by section 1 (2) of the Act, on his death or re-marriage. The married daughter (fifty-five years of age, with an income of only a few shillings a week) was awarded, in addition to a legacy of £1,000 bequeathed to her by the testatrix, the income of one-fifth of the net residuary estate, or the sum of 30s. a week, whichever should be the smaller. The principal beneficiary under the will of the testatrix was her deceased son's daughter. The decision in favour of the married daughter of the testatrix involved several points of interest. Being married (though not in fact supported by her husband) she could not be considered as a

" dependant " within the Act unless she was, " by reason of some mental or physical disability, incapable of maintaining herself " : section 1 (1) (*b*). The fact that osteoarthritis prevented her from pursuing her profession as a pianist and from undertaking heavy household duties was held to be a sufficient disability for this purpose. The Act provides (section 1 (2) (*b*)) that the order for payments of maintenance shall provide for their termination " not later than . . . in the case of a daughter who has not been married, or who is under disability, her marriage or the cesser of her disability, whichever is the later "; in view of the fact that the present applicant was already married the payments here awarded were ordered merely to cease upon the cesser of her physical disability. In view of the power of the Court, under section 4 of the Act, to vary an order for maintenance, it is noteworthy that, in making the present order, the learned Judge, being empowered by section 1 (1) to impose " conditions or restrictions ", imposed the condition that the daughter should inform the trustees if she should receive at any one time a sum in excess of £200 from any source.

Re Sylvester, *Sylvester* v. *Public Trustee*, [1941] 1 Ch. 87, contains (at p. 89) the following *dictum* by Farwell, J.: " I do not consider that in the ordinary way applications by husbands for this sort of assistance should readily be entertained. *Prima facie* a husband should be able to maintain himself, and ought not to ask the Court to give him, out of his wife's estate, more than she has thought fit to provide for him." The learned Judge added, however, that there are exceptional cases in which such an application may well be justified, and held the present case to be such an exception. The husband, on marriage, had given up his business in order to devote himself to his wife and their household affairs, and had no income of his own. She bequeathed him an annuity of £52 during his life. He was sixty-eight years of age when she died. The Court ordered this annuity to be increased to £4 a week so long as he should remain a widower.

Re White, *Mastaka* v. *Midland Bank Executor and Trustee Co., Ltd., and Lauderdale*, [1941] W. N. 29; [1941] 1 All E. R. 236, is of interest chiefly because it emphasises that the Act of 1938 applies only to the estate of a testator who " dies domiciled in England ": section 1 (1). Accordingly, Farwell, J., decided that the onus is upon an applicant for maintenance under the Act to prove affirmatively that the testator was so domiciled at his death. The present application therefore failed, the applicant being unable to establish the domicil of her mother (the testatrix) for the whereabouts of her father, a Russian, was unknown, nor was it known

whether he was still living or what his domicil was immediately before her mother's death.

Re Joslin, Joslin v. *Murch*, [1941] W. N. 38; [1941] 1 All E. R. 302, concerned a very small estate the whole of which had been bequeathed by the testator to a woman for life with remainder to his two natural children by her. He had lived with her for five years immediately preceding his death, and had left nothing to his lawful wife. Farwell, J., after reviewing the special circumstances of the case, declined to make any order in favour of the wife, and dismissed her summons with costs. It will thus be observed that, although the Act does not appear to authorise applications for maintenance by or on behalf of illegitimate children of the deceased, the Court may consider that their moral claims upon him are sufficiently strong to negative an application by a "dependant" for maintenance out of his estate at their expense.

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4. *INCOME TAX CASES.*

By Leonard Stein, Barrister-at-Law.

[The decisions selected for notice are not necessarily those of the greatest importance from the standpoint of the income tax practitioner, but those most germane to the matters with which *The Conveyancer* is primarily concerned.]

Surtax—voluntary settlement—"interest" in income arising under settlement—Finance Act, 1938, *s.* 38.—The effect of sub-section (2) of section 38 of the Finance Act, 1938, is, briefly summarised, that income arising under a settlement is to be treated, for tax purposes, as income of the settlor, and not as the income of any other person, if the settlement, or any provision thereof, can be revoked, and if, further, the effect of the revocation will, or may be, to cause the settlor, or the settlor's wife or husband, to become beneficially entitled to the settled property or its income. Sub-section (3) of section 38 deals with accumulations of income. If the settlor "has an interest" in the settled property, or the income thereof, so much of the income as is not distributed in a given year of assessment is to be treated as income of the settlor for that year. The settlor is to be deemed to have

an interest if the settled property or its income " is or will or may become payable to or applicable for the benefit of the settlor or his wife in any circumstances whatsoever ". This is not a full account of the provisions of the sub-section in question, but it is sufficient for an appreciation of the points which arose in *C. I. R.* v. *Gaunt*, [1941] 2 All E. R. 82. First, it was decided that a settlement will not be caught by reason only of the fact that the settlor's wife will or may benefit after his death. This disposes of a hitherto unsettled question as to the meaning in this context of the word " wife " (or " husband "). The benefit to be considered is a benefit arising to the settlor's wife while she is his wife or to the settlor's husband while he is her husband. A further question which arose was whether a settlor could be said to have an interest because, on his death, there would or might be a resulting trust in favour of his estate. The settlement provided that the trustees should hold the trust fund on trust to accumulate the income during the lifetime of the settlor, and after his death on such trusts as he might by will or codicil declare. It was argued that the effect of these provisions was that the settlement might offend against the rule against perpetuities, and thus give rise to a resulting trust, so that the settlor could be said to have an interest within the meaning of section 38 (3). It was held, however, that the possibility of a resulting trust in favour of the settlor's estate did not cause him to have an interest in the relevant sense.

But, though the Crown's attack failed on these two points, it succeeded on a third. The settlement provided that the settlor should have power, with the consent of certain persons, to declare new trusts, but so that this power should not be exercisable in favour of the settlor or any wife of his. For the purposes of section 38, the fact that the consent of certain persons was required was immaterial. The question was whether the limitation or the power to declare new trusts was sufficient to exclude the application of section 38. Lawrence, J., held that it was not. Without declaring trusts in his own favour or in favour of his wife, it would be possible for the settlor to declare a discretionary trust, with himself (or his wife) as one of the objects of such trust, so that when the settlement was closely analysed it was found—it was held —to be caught by the section. The clause giving the settlor power to declare new trusts was clause 7. Earlier in the settlement, clause 3 provided that neither the settlor nor any wife of his should benefit from the settlement during his lifetime, but the settlor failed in the contention that this was enough to prevent the settlement from being caught by virtue of the power to declare new trusts under clause 7.

PRECEDENTS

Form 1.

Lease of a New Dwelling-house within the Rent and Mortgage Interest Restrictions Acts at a Progressive Rent with a View to Preventing a low War-time Rent Becoming the Standard Rent (*a*).

Drafted by B. A. Bicknell, of Lincoln's Inn.

THIS LEASE made the —— day of —— BETWEEN L of *etc.* (hereinafter called "the Landlord" which expression shall where the context so admits include the estate owner or owners for the time being of the reversion expectant on the term hereby created) of the one part and T of *etc.* (hereinafter called "the Tenant" which expression shall where the context so admits include the personal representatives and assigns of the Tenant) of the other part Parties.

WITNESSETH as follows:—

1. IN CONSIDERATION of the rents covenants and conditions hereinafter reserved and contained and on the part of the Tenant to be paid observed and performed the Landlord hereby demises unto the Tenant all that messuage or dwelling-house known as —— situate at —— in the parish of —— in the county of —— and the yard garden and appurtenances thereof all which Witnesseth.

(*a*) Stamp *ad valorem*, see Stamp Act, 1891, ss. 75—78 and First Schedule; Revenue Act, 1909, s. 8; and the Finance (1909–10) Act, 1910, s. 75. This lease of premises which have not been let before is intended to operate under the proviso to s. 12 (1) (a) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and the maximum rent, as the rent payable is a progressive rent, will be the standard rent for the purposes of the Rent Restrictions Acts. The question of the best method of fixing the standard rent of new premises at a reasonable figure where war-time conditions are such that an unreasonably low rent is the only rent presently obtainable is considered *ante*, p. 34, and this form is intended to give effect to the suggestions there made.

Habendum.

premises with the dimensions and abuttals thereof are shown on the plan annexed hereto and thereon coloured —— To HOLD the same unto the Tenant from the —— day of —— for the term of —— years determinable as hereinafter mentioned paying therefor yearly during the said term hereby granted the respective rents (*b*) following that is to say during the first and second years of the said term the yearly rent of £A during the third year of the said term the rent of £A + B during the fourth year of the said term the rent of £A + B + C during the fifth year of the said term the rent of £A + B + C + D and during the sixth year of the said term the rent of £A + B + C + D + E and during the seventh and every subsequent year of the said term the yearly rent of £Z such respective rents to be paid without any deduction except for landlord's property tax by equal quarterly payments on the four usual quarter days in every year the first of such payments to be made on the —— day of —— next AND ALSO paying by way of further or additional rent such a sum or sums of money as shall be equal to the amount from time to time expended by the Landlord in insuring the premises against loss or damage by fire pursuant to the covenant on the part of the Landlord hereinafter contained such last-mentioned rent to be paid without any deduction on the quarterly day for payment of rent next following the expenditure thereof.

Tenant's covenants.

2. THE TENANT hereby covenants with the Landlord as follows: —

(i) To pay the said rents hereby reserved on the days and in manner aforesaid

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(*b*) Rent raised from time to time in this way will constitute a progressive rent within s. 12 (1) (a) of the Rent Restrictions Act, 1920: see *Wheeler* v. *Wirral*, [1935] 1 K. B. at p. 300. The maximum rent payable will be the standard rent. If the rent is to be "a progressive rent" within the sub-section it is essential that it should be raised more than once. It seems that if the rent only goes up once, this is not a progressive rent. The lease should provide for the rent being raised at least three times. If the rent becomes too high having regard to circumstances in the future, the parties can always agree to a modification of the lease. The total correct figure for each year must, of course, be inserted, the letters in clause 1 are merely to indicate how the increases are made; only the total figures should be inserted in the draft.

(ii) To pay and discharge all rates taxes assessments impositions and outgoings whatsoever now or hereafter imposed or charged upon the demised premises or payable in respect thereof either by the Landlord or the Tenant (landlord's property tax alone excepted)

(iii) At all times during the said term to place and keep the said messuage and premises [and any permitted additions thereto] in good and tenantable repair and condition

(iv) Not (without the previous written consent of the Landlord) to make any alteration [improvement] or addition in on or to the demised premises or cut or maim any walls or timbers thereof

(v) In the year —— and afterwards in every [third] and in the last year of the said term to paint with two coats at least of good oil paint all the outside wood and metal work of the demised premises [and any additions thereto permitted to be made as aforesaid]

(vi) In the year —— and afterwards in every [seventh] and in the last year of the term to paint in like manner all inside wood and iron work of the demised premises usually painted [and of any such additions as aforesaid]

(vii) On the expiration or sooner determination of the said term to yield up the demised premises [and any such additions as aforesaid] in good and tenantable repair and condition in accordance with the foregoing covenants

(viii) To permit the Landlord and his agents at any reasonable time of the day to enter upon the demised premises and to view the condition thereof and to give notice in writing to the Tenant of any want of repair then found and within —— months of the date of such notice to make good any such want of repair in accordance with the covenant in that behalf hereinbefore contained

(ix) Not to carry on or exercise nor permit or suffer to be carried on or exercised upon any part of the demised premises any trade or business (whether being a profession or not) but at all times during the continuance of the said term strictly to use and keep the demised premises as a private dwelling-house only

(x) Not to assign underlet charge or part with the possession of the demised premises or of any part thereof (without the previous written consent of the Landlord in that behalf such consent not to be unreasonably withheld in the case of a responsible and respectable person)

(xi) Not to do or suffer to be done upon any part of the demised premises any act or thing which shall be or become a nuisance annoyance or inconvenience to the owner or occupier of any adjacent or neighbouring house or land.

Proviso for re-entry.

3. If the rents hereby reserved or any part thereof shall be in arrear for twenty-one days after the same shall have become due (whether any formal or legal demand therefor shall have been made or not) or if the Tenant shall at any time fail or neglect to perform or observe any of the covenants and agreements on his part hereinbefore contained or shall become subject to the bankruptcy laws [or if any assign of the Tenant being a company shall enter into liquidation whether compulsory or voluntary not being merely a voluntary liquidation for the purpose of amalgamation or reconstruction] then and in any such case the Landlord may re-enter upon the said demised premises and hold and enjoy the same thenceforth as if this Lease had not been made.

Landlord's covenants.

4. The Landlord hereby covenants with the Tenant as follows:—

(i) That the Landlord will at all times during the said term (save only during such time if any as such insurance may be avoided by any act of the Tenant) insure and keep the demised premises insured against loss or damage by fire in some insurance office of repute in the sum of £— at the least and will at any reasonable time of the day at the request of the Tenant produce to him or his agent the policy of insurance and the receipt for the current year's premium and to cause all moneys received under such policy to be laid out in rebuilding and reinstating the said premises

(ii) That the Tenant paying the said rents hereby reserved and performing and observing the said covenants and agreements on his part hereinbefore contained shall during the said

term peaceably and quietly hold and enjoy the said demised premises without any lawful interruption or disturbance by the Landlord or any person or persons claiming through under or in trust for him.

5. If the Tenant (*c*) shall be desirous of determining this present Lease at the end of the second or any subsequent year of the said term and of such his desire shall give six months' previous written notice to the Landlord by sending the same by registered post to the last known place of abode or business of the Landlord and shall pay perform and observe all the rent covenants and conditions which ought to be respectively paid performed and observed by the Tenant up to the date of such determination then and in that case immediately after the expiration of such second or subsequent year (as the case may be) this present Lease shall cease and every covenant and condition herein contained shall become void. Power to determine.

In witness *etc.*

Form 2.

Lease of New Dwelling-house within the Rent and Mortgage Interest Restrictions Acts at a full Rack Rent with Provisions for the Reduction of the Rent while the Tenant is on Military Service, or alternatively giving power to the Tenant to determine and take a Lease at a Lower Rent with a View to Preventing a Low War-time Rent Becoming the Standard Rent. (Alternative Form.) (*a*)

Drafted by B. A. Bicknell, of Lincoln's Inn.

This lease made the —— day of —— between L of *etc.* (hereinafter called "the Landlord" which expression shall Parties.

(*c*) A provision for the determination of the lease by the tenant is advisable, so that should the war last and the rent become too high the tenant can escape from his liabilities under the lease.

(*a*) Stamp *ad valorem*: see Stamp Act, 1891, ss. 75—78 and First Schedule; Revenue Act, 1909, s. 8; and the Finance (1909–10) Act, 1910, s. 75. See notes to preceding form and article on Fixing the Standard Rent of New Premises for the Purposes of the Rent Restrictions Acts (*ante*, p. 34).

where the context so admits include the estate owner or owners for the time being of the reversion expectant on the term hereby created) of the one part and T of *etc.* (hereinafter called "the Tenant" which expression shall where the context so admits include the personal representatives and assigns of the Tenant) of the other part

Witnesseth. WITNESSETH as follows:—

1. IN CONSIDERATION of the rents covenants and conditions hereinafter reserved and contained and on the part of the Tenant to be paid observed and performed the Landlord hereby demises unto the Tenant all that messuage or dwelling-house known as —— situate at —— in the parish of —— in the county of —— and the yard garden and appurtenances thereof all which premises with the dimensions and abuttals thereof are shown on the plan annexed hereto (drawn on the margin hereof) and

Habendum. thereon coloured —— TO HOLD unto the Tenant from the —— day of —— for the term of —— years determinable as hereinafter mentioned paying therefor yearly during the said term hereby granted the rent of £X to be paid without any deductions by equal quarterly payments on the usual quarter days in every year the first of such payments to be made on the —— day of —— next AND ALSO paying by way of further or additional rent such a sum or sums of money as shall be equal to the amount from time to time expended by the Landlord in insuring the premises against loss or damage by fire pursuant to the covenant on the part of the Landlord hereinafter contained such last mentioned rent to be paid without any deduction on the quarterly day for payment of rent next following the expenditure thereof.

Tenant's covenants. 2. THE TENANT hereby covenants with the Landlord as follows:—

[*Here insert such of the Tenant's covenants contained in the last preceding precedent as are required.*]

Proviso for re-entry. 3. IF THE rents hereby reserved or any part thereof shall be in arrear for twenty-one days after the same shall have become due (whether any formal or legal demand therefor shall have been made or not) or if the Tenant shall at any time fail or neglect

to perform or observe any of the covenants and agreements on his part hereinbefore contained or shall become subject to the bankruptcy laws [or if any assign of the Tenant being a company shall enter into liquidation whether compulsory or voluntary not being merely a voluntary liquidation for the purpose of amalgamation or reconstruction] then and in any such case the Landlord may re-enter upon the said demised premises and hold and enjoy the same thenceforth as if this Lease had not been made.

4. The Landlord hereby covenants with the Tenant as follows:— Landlord's covenants:

(i) That the Landlord will at all times during the said term (save only during such time if any as such insurance may be avoided by any act of the Tenant) insure and keep the demised premises insured against loss or damage by fire in some insurance office of repute in the sum of £— at the least and will at any reasonable time of the day at the request of the Tenant produce to him or his agent the policy of insurance and the receipt for the current year's premium and to cause all moneys received under such policy to be laid out in rebuilding and reinstating the said premises to insure;

[(ii) (*b*) If the Tenant shall during the said term become engaged in full-time service in the armed forces of the Crown the Landlord will during so much of the said term as the Tenant shall be so engaged and for a period of six months from the termination of such engagement allow to the Tenant a reduction in the rent hereby reserved of £Y per annum Provided always that the aforesaid reduction shall be personal to the Tenant and in the event of the Tenant assigning or parting with possession of the demised premises the said reduction shall cease and the full rent of £X shall be payable] to accept lower rent while tenant on war service;

(iii) That the Tenant paying the said rents hereby reserved and performing and observing the said covenants and agreements on his part hereinbefore contained shall during the said term quiet enjoyment.

(*b*) If the tenant is engaged on war service or in other employment of national importance the rent can be reduced while he is so employed. If there is no such reason for a temporary reduction in rent this provision will not apply.

peaceably and quietly hold and enjoy the said demised premises without any lawful interruption or disturbance by the Landlord or any person or persons claiming through under or in trust for him.

Power to determine lease.

[5. (*c*) If the Tenant shall be desirous of determining this present Lease at the end of the first three months of the term or at any subsequent period of the said term and of such his desire shall give two months' previous written notice in writing to the Landlord expiring on any of the usual quarter days and shall pay perform and observe all the rent covenants and conditions which ought to be respectively paid performed and observed by the Tenant up to the date of such determination then and in that case immediately after the expiration of such notice this present Lease shall cease and every covenant and condition herein contained shall become void Provided always that the Tenant shall be entitled during the continuance of the present war on giving written notice of his intention in that behalf to the Landlord within at least one calendar month before the determination of the present term by notice under this clause to take a further lease of the premises for a further term of —— years at a yearly rental of £Z on the terms and conditions of this present Lease with the following modifications first such new Lease shall contain no power for the Tenant to determine such Lease or to take any further Lease of the premises and secondly such new Lease shall contain power for the Landlord to determine such new Lease by giving six months' previous notice in writing to the Tenant expiring on any of the usual quarter days.]

In witness *etc.*

(*c*) This is an alternative provision which it is thought will enable the tenant to obtain a reduction in rent without the reduced rent becoming the standard rent (see *ante*, p. 34).

Form 3.

Agreement for Sale of Freehold Premises; Payment to be Made by Instalments. Instalments to be Treated as Occupation Rent if Purchaser makes Default (*a*). **Power for Purchaser to Complete During the Fixed Period.**

Drafted by Dr. E. O. Walford, LL.D.

AN AGREEMENT made the —— day of —— 19— BETWEEN —— of —— in the County of —— (hereinafter called "the Date,

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(*a*) This form is intended (so far as practicable) to overcome the difficulty that a provision for forfeiture of instalments may be relieved against: *Re Dagenham (Thames) Dock Co.* (1873), 8 Ch. App. 1022, *Steedman* v. *Drinkle*, [1916] A. C. 270; and see *Mayson* v. *Clouet* [1924] A. C. 980. It may also prove useful in cases where the vendor is assessable to tax at the full standard rate, and even more so where the vendor is liable for surtax. If a mortgage is taken then:

(a) the costs will be far higher;

(b) the vendor must pay tax (and surtax) on the interest paid by the purchaser.

In fixing the total amount to be paid by instalments the vendor might well take into account the saving to him of tax on interest (as against a mortgage). It is not, however, suggested that instalment contracts are entirely satisfactory. In cases where the title is registered as absolute, perhaps the only substantial difficulty is that the vendor or his successor in title may not be at hand when a conveyance is required, or may not make the conveyance when required. In the case of an unregistered title the purchaser should stipulate for the right to investigate the title immediately. Otherwise he may make a number of payments only to find that the vendor has no title or that the property is mortgaged (possibly with other property). In that event the mortgage moneys may exceed the purchase price. If this should prove to be the case the purchaser may not be able to obtain a conveyance without paying off the mortgage (unless the mortgagee is willing to release the property in question on receipt of the balance of the purchase price). Other possible causes of delay or difficulty will readily occur to the practitioner. If the contract provides that time is of the essence the Court cannot extend the time for payment if the purchaser makes default in paying any of the instalments: *Steedman* v. *Drinkle* (*supra*). Accordingly the purchaser cannot obtain specific performance in such circumstances. The question whether the provision for forfeiture of instalments paid is enforceable is another matter. If the amount of the instalments plus any deposit paid would represent fair and proper damages then no doubt the vendor may retain the deposit and instalments paid by the purchaser. It will be necessary that the amount of the quarterly instalment should not exceed the amount which a full repairing tenant would pay as rent (per quarter) *if this precedent is used in its present form.* See clause 12 in which the purchaser agrees that the quarterly payments represent a fair occupation rent. Of course, the provisions of that clause are not conclusive; but unless the quarterly sum is clearly excessive it is unlikely

Parties.

Vendor" which expression shall include his executors administrators and assigns) of the one part and —— of —— in the County of —— (hereinafter called "the Purchaser" which expression where the context permits shall include his executors administrators and permitted assigns) of the other part

WHEREBY IT IS AGREED as follows:—

Agreement for sale.

1. THE Vendor will sell and the Purchaser will purchase the freehold premises shortly described in the Schedule hereto subject to the covenants stipulations and conditions contained in a conveyance dated the —— day of —— and made between —— of the one part and —— of the other part.

Purchase price to be paid by specified instalments.

2. THE purchase price of the premises mentioned in the Schedule hereto shall be £—— (*b*) which shall be paid by the Purchaser to the Vendor by —— equal [quarterly] instalments of £—— each on the —— day of —— the —— day of —— the —— day of —— and the —— day of —— in every year the first instalment to be paid on the —— day of —— next [three calendar months hence] and the balance being the sum of £—— shall be paid on the —— day of —— 19—.

Forfeiture provision in case of default.

3. IT IS DECLARED that in case the Purchaser shall fail to pay any of the said instalments of the purchase price on or within fourteen days after demand in writing made after the same shall become due or shall fail (after service of written notice specifying the breach alleged) to make good such breach within fourteen days from the date of such notice or if incapable

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that the Court would treat it as ineffective. If the instalments cannot be so fixed then it will be well to face the difficulty by agreeing upon a fair occupation rental and providing in clause 4 for the forfeiture, not of the whole of the instalments but only "of £X part of the said [quarterly] instalment in respect of every [quarter] during which the purchaser has been in possession (and so in proportion for any period less than a [quarter])". Sub-clauses (i) and (ii) of clause 4 will not then be required but sub-clauses (iii) and (iv) of clause 4 will remain. It will also be necessary to provide in clause 4 that the vendor will bring into account the difference between the amount thus forfeited and the total amount paid by way of or on account of the instalments payable under this agreement.

As to the amount to be paid if the purchaser completes earlier than the date when the final instalment is due see clause 11.

(*b*) This is the total price, assuming that all instalments are paid over the agreed period. See clause 11 as to the amount payable if the purchaser completes (as he may) during the fixed period.

(by reason of its nature) of being made good within that period within a reasonable period from the date of such notice then the Vendor may by written notification to the Purchaser (hereinafter called "the rescission notice") declare the contract to be rescinded by the Purchaser's default and in each case the Purchaser shall forthwith give vacant possession of the said premises to the Vendor and the provisions of clause 4 shall apply.

4. In the event of the determination of this agreement under clause 3 of this agreement then—

(i) All instalments of the purchase price paid by the Purchaser shall belong to the Vendor

(ii) The Purchaser shall pay to the Vendor all instalments of the purchase price due to be paid on or prior to the date of service of the rescission notice and remaining unpaid and the proper proportion of the [quarterly] instalment accruing due from the last [quarter day] up to the said date on which vacant possession is given to the Vendor

(iii) All rates taxes and outgoings shall be apportioned as at the date on which vacant possession is given to the Vendor in the usual manner as on a sale to the Vendor due for completion on the date on which vacant possession is given as aforesaid and due payment or allowance shall be made by or to the Purchaser as the case may be

(*c*) (iv) The Purchaser shall either expend such sum as shall be necessary to put the said freehold premises in all respects in good and substantial repair and decorative condition (suitable for letting to a tenant at a full rack rent) or shall pay to the Vendor such sum as shall be sufficient to meet the expenses of putting the said freehold premises into such repair and condition as aforesaid

Purchaser to enter as tenant at will on paying first instalment and costs of agreement.

5. On complying with clause 15 of this agreement the Purchaser shall be let into possession as tenant at will at a peppercorn rent of the premises mentioned in the First Schedule

(*c*) If rescission takes place at an early date it is doubtful whether this provision could be fully enforced.

hereto and as from that date shall be liable for and shall discharge and indemnify the Vendor against all rates taxes including income tax (Schedule A) and all other outgoings as if he had completed the purchase And if the Vendor shall pay any such outgoings the Purchaser shall pay to the Vendor a sum equal to the amount so paid by the Vendor.

Tenancy at will only to be determined in case of default by purchaser.

6. The Vendor hereby agrees that he will only determine the said tenancy at will if the Purchaser shall make default in the performance or observance of his obligations under this agreement but the remedy of the Purchaser owing to the wrongful determination of the said tenancy at will shall so far only as concerns deprivation of possession be in damages only and nothing herein shall confer on the Purchaser any tenancy other than a tenancy at will or prevent the Vendor from determining the said tenancy at will at any time subject to the Purchaser's right to damages in respect of deprivation of possession owing to the wrongful determination of such tenancy Provided nevertheless that neither an order for possession following determination of the said tenancy at will nor the giving of vacant possession (a) pursuant to such order or (b) following such determination and before any order for possession has been made shall deprive the purchaser of his right or equity (if any) to specific performance of this agreement and restoration of possession if the said tenancy has been wrongfully determined or operate as an admission of his default under this Agreement But the Purchaser shall not be entitled to any relief under this proviso after determination of the said tenancy unless he shall previously have given to the Vendor vacant possession of the premises hereby agreed to be sold (*d*).

(*d*) It seems a little doubtful whether this last provision would be effective if the purchaser could satisfy the Court that there was a *prima facie* case for supposing that the determination of the tenancy was wrongful. Indeed it might well be held that the provision is void as purporting to oust the jurisdiction of the Court. On the other hand it is unlikely that the vendor would wrongfully determine the tenancy, and the provision is really intended to assist where a defaulting purchaser maliciously seeks to remain in possession and presents to the Court a specious but not too convincing defence. The Court might then require the purchaser to abide by his bargain as a condition of requiring the vendor specifically to perform his part.

Incorporation of Law Society's Conditions.

7. The Law Society's Conditions of Sale (1934) so far as the same are applicable to a sale by private treaty and so far as they are not varied by or inconsistent with the conditions herein contained shall apply to this agreement. The said Conditions shall be read and construed as if the date for completion therein referred to were the possession day (as hereinbefore defined) and all apportionments shall be made on the possession day accordingly.

Title.

8. The title shall [consist of a copy of the entries on the Register at H.M. Land Registry where the title to the said premises is registered as an Absolute Title] Such copy shall be delivered at the Vendor's expense but other costs of deducing title and of transfer shall be borne by the respective parties in the usual manner as on a sale and purchase.

Assurance on completion.

9. On the payment of the balance of the purchase money in accordance with clause 2 or clause 11 hereof and of all other moneys which may then be due and owing to the Vendor under the provisions herein contained the Vendor and any other necessary parties will execute a proper assurance to the Purchaser of the said premises such assurance to be prepared by and at the expense of the Purchaser. The Purchaser shall in the assurance to him covenant with the Vendor by way of indemnity only to perform and observe the covenants stipulations and conditions hereinbefore referred to and to indemnify the Vendor from and against all claims actions proceedings costs damages and demands in respect of any breach of non-performance thereof (*e*).

Covenants by purchaser:

10. The Purchaser hereby agrees with the Vendors as follows:—

(1) So long after the possession day as any instalment of purchase money shall remain unpaid and this agreement remains in force (*f*):

(*e*) If new covenants are being imposed this clause will require alteration, and the "benefited" land should be clearly defined.

(*f*) The purchaser is placed under obligations similar to those which would be imposed on a full repairing tenant. The intention is to enable the vendor to control the manner in which the property shall be used and to ensure that it shall be kept in repair in case it is thrown back on his hands owing to default by the purchaser in paying the instalments.

To repair;

(a) To keep the said premises and generally all buildings for the time being comprised herein and the drains sanitary and water apparatus and all the fixtures and additions thereto (including all alterations and additions to the said buildings) and also the boundary walls and fences and all gates in good and substantial repair and to keep the garden and lawns in a good state of cultivation and in neat and orderly condition and particularly to keep the lawns close mown and to preserve in good condition all trees plants and shrubs and ornamental items in or about the said premises

To carry out exterior and interior decorations periodically;

(b) In particular (and without prejudice to the last sub-clause) to paint with three coats of good oil paint in a workmanlike manner all the wood iron and other parts of the said buildings heretofore or usually painted as to the external work in the three months immediately preceding the —— day of —— 19— and in the three months immediately preceding the expiry of each subsequent third year and as to the internal work in the last three months immediately preceding the —— day of —— 19— and in the three months immediately preceding the expiry of each subsequent seventh year and after every internal painting to grain varnish distemper wash stop whiten and colour or otherwise decorate all such parts as have previously been so dealt with and to repaper with good paper the parts previously papered or which ought to be papered Provided that nothing herein shall absolve the Purchaser from his obligations under the last preceding sub-clause in the event of the determination or rescission of this agreement under any provision herein contained or owing to the default of the Purchaser

Not to make alterations;

(c) Not to make in or upon the premises comprised herein or any part thereof whether internally or externally any alterations additions or new erections whatsoever without the Vendor's written consent which shall not be unreasonably withheld

(d) To permit the Vendor and his agents with or without

workmen and others at reasonable times to enter upon and view the condition of the said premises and that the Purchaser will forthwith (in accordance with his obligations hereunder) execute all repairs and works required to be done by written notice given by the Vendor Provided always that if the Purchaser shall not within thirty days after service of such notice (or forthwith if necessary for the preservation of any part of the said premises or otherwise urgently required) commence and proceed diligently with the execution of the repairs and works mentioned in such notice it shall be lawful for but not obligatory upon the Vendor as the agent of the Purchaser to enter upon the said premises to execute such repairs and works and the expenditure by the Vendor in respect thereof (including surveyors fees for inspection reports and supervision) together with interest at the rate of [4] per cent. per annum from the time of expenditure until repayment shall be a debt due from the Purchaser to the Vendor repayable on demand

To execute repairs on notice with power for vendor to do so in case of default by purchaser;

(e) Not to hold or permit to be held any sale by auction on the said premises

Not to hold any auction;

[(f) To perform and observe all and every the covenants and stipulations and conditions contained in the said conveyance dated the —— day of —— and to indemnify the Vendor from and against all claims actions proceedings costs damages and demands in respect of any breach or non-performance thereof]

[To perform covenants and stipulations above mentioned;]

(g) That the said premises shall not be used for any purpose except that of a [private dwelling-house in the occupation of one family only]

To use as [private dwelling-house] only;

(h) To repay to the Vendor the amount of the premiums which the Vendor may yearly or otherwise pay for the following insurances:—

To repay insurance premium;

(i) Insurance of the buildings comprised herein in the joint names of the Vendor and Purchaser against loss or damage by fire (including fire caused by military operations if and when insurable)

in such sum as will cover the cost of rebuilding and reinstating the same in case of total destruction by fire

(ii) Insurance in respect of one year's loss of rent (at the rate of £—— per annum) in respect of damage or destruction by fire

such amounts (in each case) to be paid with the quarterly instalment of the purchase price which shall become due next after the payment of the said premiums

Not to do anything to avoid policies;

(i) That nothing shall be done whereby the policy or policies of insurance on the said premises against damage by fire for the time being in force may become void or voidable or whereby the rate of premium thereon may be increased and that the Purchaser will repay to the Vendor all sums paid by way of increased premium and all expenses incurred by the Vendor in or about any renewal of such policy or policies rendered necessary by a breach of this covenant

Not to exhibit signs;

[(j) Not to affix or exhibit or permit to be affixed or exhibited to or upon any part of the exterior of the said premises any placard notice poster sign signboard plate or other advertisement]

Not to commit nuisance;

(k) Not to do or suffer to be done upon the demised premises anything which shall be or is likely to become a nuisance to the Vendor or the owners or occupiers of any neighbouring premises or which will or may detract from the amenities of the demised premises or the neighbourhood

Not to assign or underlet, etc.

(l) Not to assign underlet share or part with the possession of or grant any licence for user of the said premises or any part thereof but the Vendor's consent to an assignment of this agreement shall not be unreasonably withheld.

Power for purchaser to complete purchase at an earlier date.

11. PROVIDED ALWAYS and it is hereby agreed that if the Purchaser shall be desirous of completing the purchase of the said premises at any time before the balance of the purchase

money shall become due in accordance with clause 2 hereof and shall give to the Vendor at least one calendar month's previous written notice then on the expiry of such notice and upon payment by the Purchaser of £—— (*g*) the Vendor will assure the said premises to the Purchaser in like manner as provided in clause 9 hereof. The Purchaser shall with the sum of £—— pay to the Vendor any instalments due but not paid on account of the purchase price and the due proportionate part of the instalment or instalments for the then current quarter (calculated up to the date of actual completion of the purchase).

12. The Purchaser hereby expressly declares that the amount of £—— payable by him each quarter on account of the purchase price has been agreed between the Vendor and the Purchaser as a fair and proper occupation rent of the said premises upon the footing that the tenant is responsible for keeping the said premises in good and tenantable repair and is responsible for all rates taxes assessments and outgoings in connection with the said premises (including Schedule A tax) (*h*) and for insurance against damage by fire of the buildings comprised in this agreement and generally for performing and observing the obligations imposed on the Purchaser by this agreement (*i*).

13. Time shall be of the essence of the contract in relation to all the provisions of this contract. Time of essence.

(*g*) This will be the basic figure, *i.e.*, the price at which the vendor is in fact prepared to sell for immediate cash. All payments up to actual completion will be taken as if the same were rent and the basic figure will always be the option price.

(*h*) Note that the purchaser will be liable to pay Schedule A tax which the ordinary tenant would not pay.

(*i*) The object of this provision is to meet so far as possible the point referred to in note (*a*) above, p. 337. It will place the purchaser in difficulty in disputing the terms of this clause if he cannot show beyond doubt that the periodical payment is materially in excess of the amount which any tenant could reasonably be expected to pay under similar conditions as rent for such a period (see footnote to clause 3). If the instalment is on a higher basis it will be necessary to substitute an appropriate figure as the amount agreed upon as a fair occupation rent. This will in turn involve the substitution in clause 4 of the provision for forfeiture of part only of the instalments paid. (See footnote to clause 3.)

Note of agreement to be entered on Register.

(*k*) [14. The Vendor agrees subject to payment by the Purchaser of the sums to be paid to him under this agreement on the possession day forthwith to lodge the Land Certificate relating to the said freehold premises at the Land Registry to enable this agreement to be entered on the Register affecting the title. The Purchaser hereby agrees with the Vendor that if he shall make default in any of his obligations under this agreement and consequent thereupon the Vendor shall declare the contract to be rescinded by the Purchaser's default then the Purchaser will thereupon immediately cause to be removed from the Register affecting the title to the said freehold premises the entry in relation to this agreement And the Purchaser hereby irrevocably appoints the Vendor his executors administrators and assigns to be his attorney and attorneys for him and on his behalf to make application and to take any other requisite steps for removal from registration of any entry which may be made in the Register relating to the Vendor's title or in any other Register kept by the Registrar pending actual lodgment with the Registrar of a transfer in favour of the Purchaser And it is expressly declared that the Registrar shall not be concerned or entitled to inquire into the propriety of any purported exercise of this power of attorney but on the contrary any such purported exercise shall notwithstanding any such impropriety be valid and effective for all purposes Provided that nothing herein shall deprive the Purchaser of his right to recover damages from the Vendor his executors administrators or assigns in respect of any wrongful exercise of the said power (*l*).]

Purchaser to pay costs and disbursements.

15. The Purchaser shall on the signing of this agreement pay all costs stamp duties and other disbursements incidental

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(*k*) *I.e.*, if registered property. If it is unregistered, provision for entry and removal of a land charge (with similar power of attorney) will be necessary.

(*l*) It is to be assumed that a defaulting purchaser may not comply with a request for the removal of the entry on the Register affecting the title. Without this power of attorney the vendor might be put to the expense of legal proceedings in order to obtain the removal of such an entry. The entry of a caution on behalf of the purchaser would be desirable in his interest, in order to prevent the vendor from exercising this power without the knowledge of the purchaser.

to the preparation and completion of two parts of this agreement [and also the costs incurred in relation to the entering of a note of this agreement on the Register at H.M. Land Registry affecting the title to the said freehold premises and the Land Registry fees in connection therewith] The costs are agreed at £—— (excluding disbursements).

As witness the hands of the parties.

The Schedule before referred to.

The freehold house and land known as —— in the County of —— as the same is registered at H.M. Land Registry under Title No. —— and shown and [edged red] on the plan filed under that Title Number a copy of which plan is annexed hereto.

Form 4.

Continuing Arrangement or Pool Agreement Complying With the Requirements of the Building Societies Act, 1939, Providing Additional Security for a Building Society (*a*).

This continuing arrangement is made the —— day of —— 19— between A of *etc.* builder in the county of —— (herein called "the Builder" which expression shall where the context Parties.

(*a*) Stamp 10s. This form, which is based on a pre-1939 Act form kindly sent by Messrs. Hartley & Worstenholme, of Castleford, is intended to comply with the requirements of the Building Societies Act, 1939, with regard to continuing arrangements. A continuing arrangement is defined as meaning "any arrangement made between a society and another person whereby, in contemplation of a series of advances comprising excess advances being made by the society to members for the purpose of their being used in defraying the purchase prices of freehold or leasehold estates, that person undertakes to give to the society a series of guarantees, each of which is to secure sums payable to the society in respect of such an advance": s. 16.

A building society has no power to take into consideration, in determining the amount of any advance upon the security of freehold or leasehold property, the value of any additional security for the advance except of a class in Part I of the Schedule to the Act. The eighth class of security in Part I, para 8, is a guarantee given in pursuance of a continuing arrangement which conforms to the requirements of Part II of the Schedule supported by deposits of money. Part II provides that:—

"In order to conform to the requirements of this Part of this Schedule, a continuing arrangement must provide:—

(a) that each guarantee given in pursuance of the arrangement by the

so admits include his executors administrators or assigns) of the one part and the X Building Society incorporated under the

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person (hereinafter referred to as 'the guarantor') with whom the society made the arrangement will secure repayment to the society—

(i) on account of the principal of the advance to which the guarantee relates, of a sum not less than the amount by which the advance exceeds two-thirds of the purchase price for the defraying of which the advance was made, and

(ii) of all sums which may accrue due to the society in respect of the advance (otherwise than on account of the principal thereof) before the sums repayable to the society on account of the said principal have been reduced to two-thirds of the said purchase price;

(b) that the guarantor will not be released from his liability in respect of any such guarantee until the sum repayable to the society in respect of the principal of the advance to which it relates has been reduced to or below an amount equal to two-thirds of the purchase price for the defraying of which the advance was made;

(c) that the guarantor will deposit with the society, as security for his liability in respect of each guarantee, a sum of money, which in the case of the first five guarantees shall be at least equal to the amount of the excess advance, and in the case of each subsequent guarantee shall be at least equal to one-third of that amount;

(d) that, subject to any right of withdrawal which may be given by the arrangement in conformity with the next following paragraph, each sum deposited as aforesaid will be held by the society, not only as security for the liability of the guarantor in respect of the guarantee in connection with which it was deposited, but also as security for such sums as may become due to the society in respect of all such advances made (whether before or after the deposit) in pursuance of the arrangement as are, for the time being, advances of which the sums repayable in respect of principal have not been reduced to the amount mentioned in paragraph (b) of this Part of this Schedule;

(e) that no withdrawal of or from the sums deposited with the society as aforesaid may be made by the guarantor unless the sums held by the society in accordance with the last foregoing paragraph as security in respect of the advances therein mentioned will, after the withdrawal, be of an amount at least equal to the sum of:—

(i) the amount by which the aggregate of the sums then repayable to the society in respect of the principal of such of the said advances as were included in the first five advances made by the society in pursuance of the arrangement exceeds two-thirds of the aggregate of the purchase prices for the defraying of which such of the said advances as were so included were made, and

(ii) one-third of the amount by which the aggregate of the sums then repayable to the society in respect of the principal of such of the said advances as were not included in the first five advances made by the society in pursuance of the arrangement exceeds an amount equal to two-thirds of the aggregate of the purchase prices for the defraying of which such of the said advances as were not so included were made . . ." Part II further provides for the modification of the restrictions on withdrawal in certain circumstances with the consent of the Chief Registrar of Friendly Societies.

Building Societies Acts 1874 to 1939 whose registered office is situate at —— (herein called "the Society" which expression shall where the context so admits include their assigns) of the other part

WHEREAS:— Recitals:

1. THE Builder is erecting or intending to erect a number of dwelling-houses on his estates situate at —— in the county of —— and elsewhere and it is apprehended that the respective purchasers of such houses may apply to the Society for advances upon the security of their respective houses Development of estate;

2. THE Society are willing in such cases as they shall in their absolute discretion think fit to advance up to ninety-five (*b*) pounds per centum of the amount of the purchase price of the property offered as security upon having additional security to be provided by the Builder in manner hereinafter appearing Intention of Society to make loans.

NOW THEREFORE IT IS HEREBY AGREED as follows:— Definition clause.

1. (1) In this Agreement the following expressions shall where the context so admits have the following respective meanings that is to say:—

(a) "Customer" means a person who shall have purchased from the Builder a house on one of the said estates

(b) "The Society's valuation" means a valuation made by the Society's surveyor for the time being

(c) "The purchase price" (*c*) means the sum payable by the customer for the house and land

(d) "A customer's mortgage" means a mortgage in the Society's usual form made by the customer in favour of the Society of the house which such customer shall have purchased from the Builder

(e) "The mortgaged house" means the property comprised in and charged by a customer's mortgage

(f) "The sum advanced" means the principal sum initially secured by a customer's mortgage

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(*b*) The advance must not exceed 95 per cent. of the purchase price, where a guarantee is given in pursuance of a continuing arrangement, see s. 2 (4).

(*c*) Purchase price. See also, in the case of leaseholds, the definition in s. 16 (1).

(g) "Basic advance" (*d*) means the maximum amount which the Society would consider proper to advance upon the security of the mortgaged house if no other security were taken by the Society but so that in no case shall such advance exceed seventy-five per cent. of the purchase price (*e*)

(h) "Excess advance" (*f*) means in relation to an advance the amount by which the advance exceeds the basic advance

(i) "The amount required to redeem a customer's mortgage" shall include principal interest fines and other moneys secured by the mortgage and all costs charges and expenses incurred by the Society in relation to the security

(2) This Agreement applies to every customer's mortgage where the sum advanced exceeds the basic advance

(3) Nothing herein contained shall operate to impose or be construed as imposing any obligation on the Society to make any advance or loan at all in any particular case or to make a loan or advance of any particular amount or to interfere in any way with the conduct of the Society's business or with the conditions or terms of any advance or loan or mortgage or security or other transaction which may in fact be made

(4) The liability of the Builder to the Society under this Agreement shall be that of a principal debtor so that the Builder and the pool hereinafter referred to shall in no way be released by time being given to a customer or his representatives or assigns or by any other variation in the provisions of a customer's mortgage or by any other act omission matter or thing whatsoever whereby the Builder as surety only or the pool would have been so released.

Covenant by Builder to pay.

2. THE Builder (*g*) hereby covenants with the Society that he will when each advance is made execute a guarantee

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(*d*) The definition follows that in s. 16 (1) with the addition of the restriction limiting the advance to 75 per cent. of the purchase price imposed by s. 2 (4).

(*e*) The Act generally refers to the purchase price and not to the value of the property: see s. 2 (4).

(*f*) This follows the definition in s. 16.

(*g*) It would seem that under the definition of continuing arrangement in s. 16 and under Part II of the First Schedule the builder has not only got to make deposits of cash, he must also personally guarantee to pay each the excess advance.

whereby he will covenant with the Society to pay to the Society on account of every sum advanced first a sum equal to the amount by which the sum advanced exceeds two-thirds (*h*) of the purchase price for the defraying of which the advance was made and secondly all sums which may accrue due to the Society in respect of the sum advanced (otherwise than on account of the principal thereof) before the sums repayable to the Society on account of the sum advanced have been reduced to two-thirds (*h*) of the said purchase price.

Agreement to deposit moneys.

3. The Builder will on or before the execution of each customer's mortgage to which this Agreement applies deposit with the Society a sum of money (*i*) which in the case of the first five (*k*) advances shall be equal to the amount of the excess advance and in the case of each subsequent advance shall be equal to one-third of that amount.

Deposits to be placed to account.

4. The sums deposited by the Builder shall be placed in a deposit account with the Society (*l*) and the Society shall allow interest on the said deposit account by yearly payments at the current rate for the time being allowed by the Society to the depositors and such interest shall be credited to the said deposit account and may be withdrawn by the Builder at the end of each financial year of the Society on the usual notice being given.

5. The moneys deposited or to be deposited by the Builder as aforesaid (hereinafter referred to as "the pool") shall be a collateral and floating security for each and all advances made or to be made as aforesaid.

6. In the event of the power of sale under a customer's mortgage to which this Agreement applies becoming immediately exercisable by the Society before the sum advanced has been reduced to two-thirds of the purchase price then if the Society shall advertise (in one or more papers in such one or

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(*h*) This figure may be 70 per cent. of the purchase price in the case of a special continuing arrangement: see s. 5 (3) (a), (b).

(*i*) This complies with the requirement of First Schedule, Part II (c).

(*k*) If the continuing arrangement is a special continuing arrangement complying with s. 5 then this may be four: see s. 5 (3) (c).

(*l*) The moneys must be deposited with the society: see First Schedule, Part II (c). It is not permissible to make the deposit to other persons as stakeholders or to place it in the joint names of the builder and the society.

more issues as the Society in their absolute discretion think fit) for a purchaser of the mortgaged house and no acceptable offer from a responsible person shall be received offering a price not less than the amount required to redeem such customer's mortgage or such offer although accepted shall not be completed through no default of the Society the Society shall serve a notice in writing on the Builder informing him of their failure to sell the mortgaged house and the Builder shall have the option either of purchasing the mortgaged house or of taking a transfer of such customer's mortgage from the Society at the amount then required to redeem such customer's mortgage.

7. If the Builder shall fail within fourteen days of receiving such notice as aforesaid (time being of the essence) to purchase the mortgaged house or take such transfer of such customer's mortgage the Society may (without prejudice to their other rights remedies and powers) exercise their power of sale under the customer's mortgage and generally realise the mortgaged house at such price and in any manner they think proper and without further reference to the Builder And if the net proceeds of the sale of the mortgaged house shall be insufficient to discharge the amount required to redeem such customer's mortgage the Society shall be entitled without any application to the Builder to deduct from the pool the loss incurred in respect of such customer's mortgage Provided always that the loss on any one such customer's mortgage to be so deducted from the pool shall not exceed the sum by which the amount required to redeem such customer's mortgage immediately prior to the completion of the sale of the mortgaged house and before any of the proceeds of the sale have been credited to such customer's account exceeds two-thirds of the purchase price and of all sums which may accrue due to the Society in respect of customer's mortgage before the sums repayable to the Society have been reduced to two-thirds of the said purchase price.

8. As and when from time to time a group of twelve customers' mortgages shall have been either transferred to the Builder or reduced to two-thirds pounds of the purchase price the Builder may apply to the Society for a refund of the amount

deposited in respect of such twelve customers' mortgages whereupon the Society will refund such sum to the Builder PROVIDED ALWAYS (*m*) that no withdrawal from the pool may be made under this clause unless the sums held by the Society will after the withdrawal be of an amount at least equal to the sum of:—

(i) the amount by which the aggregate of the sums then repayable to the Society in respect of the principal of such of the said advances as were included in the first five advances made by the Society in pursuance of the arrangement exceeds two-thirds of the aggregate of the purchase prices for the defraying of which such of the said advances as were so included were made and

(ii) one-third of the amount by which the aggregate of the sums then repayable to the Society in respect of the principal of such of the said advances as were not included in the first five advances made by the Society in pursuance of the arrangement exceeds an amount equal to two-thirds of the aggregate of the purchase prices for the defraying of which such of the said advances as were not so included were made.

9. THE Builder may at any time give to the Society notice terminating this continuing arrangement and thereupon the Builder shall cease to be liable to deposit with the Society any further moneys hereunder but subject as aforesaid the provisions hereof shall continue in operation.

10. FOR the purposes of this deed entries in the books of the Society shall be deemed conclusive unless the sum shall be proved to be incorrect.

IN WITNESS *etc.*

(*m*) This fulfils the requirements of First Schedule, Part II (e).

Form 5.

Advertisement of Intended Change of Name to Comply with the Defence (General) Regulations, 1939, r. 20 (*a*).

NOTICE IS HEREBY GIVEN that A [*give name in full*] of [*address, profession or occupation*] a natural born [naturalised] British subject intends after the expiration of twenty-one days from the date of publication of this notice to assume the surname of B in lieu of and in substitution for his present surname of A.

Dated *etc.*

Signed —— X of ——,
Solicitor.

Alternative Form.

I A [*give name in full*] of [*address, profession or occupation*] a natural born [naturalised] British subject hereby give notice that I intend after the expiration of twenty-one days from the date of this notice to assume the name of B in substitution for my present name of A.

Dated the —— day of ——.

Signed A.

(*a*) Under the Defence (General) Regulations, 1939, made under the Emergency Powers (Defence) Act, 1939, the common law right of a man to change his name without formality has been modified. Reg. 20 (1) modifying the Aliens Restriction (Amendment) Act, 1919, in effect prohibits any alien to change his name or the name or style of his business. Reg. 20 further provides:—

"(2) No British subject who is in the United Kingdom on the date of the coming into force of this Regulation, shall, while in the United Kingdom at any time after that date, assume or use or purport to assume for any purpose any name other than that by which he was ordinarily known immediately before the said date, unless, at least twenty-one days before the day on which he first assumes or uses or purports to assume that other name, he has caused to be published in the London Gazette, the Edinburgh Gazette or the Belfast Gazette a notice specifying—

"(a) his existing name in full and the change which he proposes to make in it, and

"(b) the address of his place of residence or place of abode, if in the United Kingdom.

"(3) In relation to any British subject who, not having been in the United Kingdom on the date of the coming into force of this Regulation,

Form 6.

Assignment by a Company in Liquidation to a New Company With the Consent of the Local Authority of the Benefit of a Building Contract With the Authority, Provisions Modifying the Contract to Meet War Conditions and War Damage and for the Substitution of New Sureties (*a*).

THIS DEED is made the —— day of —— 19— BETWEEN the Mayor Aldermen and Burgesses of the Borough of X (hereinafter called "the Corporation") of the first part A Limited in liquidation whose registered office is situate at *etc.* (hereinafter called "the Assignor") of the second part B of *etc.* (hereinafter called "the Liquidator") of the third part C of *etc.* and D of *etc.* (hereinafter called "the Sureties") of the fourth part Parties.

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thereafter lands in the United Kingdom, paragraph (2) of this Regulation shall have effect as if for any reference in that paragraph to the said date there were substituted a reference to the day on which he first lands in the United Kingdom after the said date.

"(4) Nothing in paragraph (2) of this Regulation shall apply in relation to—

"(a) the assumption or use of any name in pursuance of a Royal Licence,

"(b) the assumption or use of any name in consequence of the grant of, or succession to, any peerage,

"(c) the assumption or use by any married woman of her husband's name,

"(d) the carrying on of any business under any business name within the meaning of the Registration of Business Names Act, 1916, in circumstances in which registration in connection with the carrying on of the business is either required by that Act or declared by any provision of that Act to be unnecessary, or

"(e) the assumption or use of any name in such circumstances as may be specified by order of the Secretary of State.

"(5) For the purposes of this Regulation and of section seven of the Aliens Restriction (Amendment) Act, 1919—

"(a) the expression 'name' shall be construed as including surname, and a name shall be deemed to be changed if the spelling thereof is altered, and

"(b) a person entering Northern Ireland by land shall be deemed thereby, to land in the United Kingdom."

After the expiration of the twenty-one days the old procedure is generally followed, the change of name being evidenced by the execution of a deed poll, which is enrolled in the Central Office, and a further advertisement giving notice of the change is inserted in the London Gazette.

(*a*) Stamp, *ad valorem* on the sums paid as consideration for the assignment.

and E Limited whose registered office is at *etc.* (hereinafter called "the Assignee") of the fifth part

Recitals: WHEREAS:

Contract: (1) By a contract in writing (hereinafter referred to as "the contract") dated the —— day of —— 19— and made between the Corporation of the one part and the Assignor of the other part the Assignor agreed for the consideration therein mentioned (hereinafter referred to as "the contract price") to erect and complete the building and other works at —— in the county of —— therein more particularly described and shown upon the drawings and described or referred to or implied in the specification and general conditions annexed to the contract and all modified substituted and/or additional work ordered or to be ordered by the engineer in the contract mentioned in accordance with the contract (all of which said works are hereinafter referred to as "the works")

Deed of suretyship; (2) By a deed poll bearing even date with the contract the Sureties were held and firmly bound to the Corporation in the sum of £—— for the due performance as therein mentioned of the contract

Resolution for liquidation; (3) At a general meeting of the Assignor held on the —— day of —— 19— a special resolution was duly passed that the Assignor be wound up voluntarily but no such statutory declaration as is mentioned in section two hundred and thirty of the Companies Act 1929 was before the sending out of notices convening the said meeting delivered to the Registrar of Companies for registration

Appointment of Liquidator; (4) At a meeting of the creditors of the assignor held on the —— day of —— 19— the Liquidator was nominated Liquidator of the Assignor for the purposes of such winding up.

Publication of notice; (5) Notice of the said resolution was published in the London Gazette on the —— day of —— 19—

Payment for completed work; (6) The Assignor has completed portions of the works (including certain varied and additional works under the provisions of the contract) payment for the whole of which has been made to the Assignor as the Assignor and the Liquidator hereby acknowledge

Agreement for assignment of contract; (7) The Liquidator in the name and on behalf of the

Assignor has with the consent of the Sureties agreed with the Assignee in consideration of the covenants hereinafter contained to assign to the assignee the benefit of the contract subject to the obligations and liabilities thereunder and the Assignee has agreed in consideration of £—— to take an assignment of the benefit of the contract subject to the obligations and liabilities thereunder and to enter into the covenants hereinafter contained upon having the terms of the contract modified in manner hereinafter appearing.

Concurrence of Corporation.

(8) The Corporation in consideration of the payment of the sum of £—— and of the covenants and provisions on the part of the Assignee hereinafter contained has agreed to join in these presents for the purpose of granting the several releases hereinafter contained and for the purpose of modifying the contract in manner hereinafter appearing

NOW THIS DEED WITNESSETH as follows:—

Assignment of benefit of contract.

1. WITH THE consent of the Corporation hereby testified and in consideration of the covenants by the Assignee hereinafter contained the Assignor acting by the Liquidator hereby assigns and the Liquidator as trustee hereby assigns and confirms to the Assignee all the interest benefits obligations and liabilities of the Assignor under the contract as from the date of these presents PROVIDED ALWAYS that the Assignee shall not be responsible for any liabilities or obligations of the Assignor which may have been incurred or accrued up to the date hereof.

Agreement by Assignee to fulfil contract.

2. THE ASSIGNEE in consideration of the sum of £—— now paid to the Assignee by the Liquidator by and on behalf of the Assignor (the receipt whereof the Assignee hereby acknowledges) and of the covenant by the Corporation hereinafter in clause 3 contained agrees with the Assignor and the Corporation to execute complete and maintain the whole of the works (in so far as the same have not been already executed by the Assignor) in all respects in accordance with and subject to the provisions of the contract and to observe perform and discharge all the conditions obligations and liabilities to be observed performed and discharged by the Assignor under the contract provided always that the modifications set out in the Schedule hereto annexed shall have effect as from the date of these presents.

Agreement by Corporation to accept Assignee as contractor.

3. In consideration of the performance by the Assignee of the covenants by the Assignee in clause 2 hereof contained the Corporation will pay to the Assignee the balance of the contract price that is to say the contract price less the aggregate of the sums paid by the Corporation to the Assignor together with the cost of any modified substituted and/or additional work ordered or to be ordered by the Corporation but such balance of the contract price shall be increased or decreased in the manner and to the extent set out in the said Schedule And it is further agreed and declared that the contract shall operate and take effect as if the provisions in the Schedule hereto were incorporated therein from the date hereof.

Release of Assignor from future obligations.

4. The Corporation in consideration of the sum of £—— now paid to the Corporation by the Liquidator for and on behalf of the Assignor (the receipt of which sum the Corporation hereby acknowledges) hereby releases and discharges the Assignor and the Liquidator from all claims and demands which might be made by the Corporation against the Assignor under the contract or for breach or alleged breach thereof.

Undertaking to release Sureties.

5. The Corporation for the consideration aforesaid hereby covenants with the Sureties and the Assignor that as and when —— Bank Ltd. are held and bound to the Corporation in the said sum of £—— for the due performance of the contract by the Assignee then the said deed poll of the —— day of —— 19— shall thereupon become void and the Sureties shall be released therefrom accordingly.

In witness *etc.*

The Schedule.

1. The date fixed for completion of the works shall be the —— day of —— 19— in substitution for the —— day of —— 19— fixed in the contract.

2. If since the date of the contract there has been or shall be any increases or decreases in the rates of wages payable to labour of any kind employed by the assignee for the purpose of the works or any increase or decrease in the cost of materials prevailing at such date which increase or increases decrease or decreases shall result in an increase or decrease of cost to the

Assignee in carrying out the works the net increase or decrease shall form an addition or deduction as the case may be to or from the contract price and be paid to or allowed by the Assignee accordingly. The amount of such increase or decrease as the case may be shall be ascertained and certified by the engineer named in the contract whose certificate shall be a condition precedent to payment.

3. The Assignee will not be responsible for any delays due to inability to obtain materials insufficiency of labour or other impediments.

4. If any necessary materials cannot be obtained when they are wanted the parties will apply to the architect named in the contract with a view to obtaining his consent to the utilisation of alternative materials or the modification of the design or specifications or other means of meeting the difficulty Any directions given by the architect pursuant to any such application as aforesaid shall be conclusive and binding on all parties.

5. War damage to the works and to all materials and Assignee's plant on the site not exceeding in the aggregate £—— shall be borne by the Assignee War damage as aforesaid exceeding in the aggregate the sum of £—— shall be borne by the Corporation who will make good to the Assignee all loss and war damage so suffered in excess of the sum of £—— If any such loss or damage occurs exceeding the sum of £—— the Assignee shall not be obliged to undertake reinstatement or completion of the works unless and until the Corporation shall have paid to the Assignee such a sum in excess of the sum of £—— as shall be necessary to reinstate and make good the war damage.

6. The Assignees shall forthwith erect and maintain on the site of the works all air-raid shelters which owing to statutory requirements or the requirements of any proper authority are now or may be necessary for the protection of the Assignee's workmen and others and the cost of the labour and materials therefor shall be borne and paid by the Corporation and shall be in addition to the contract price.

7. Reinstatement and replacement of war damage (including clearance of debris and demolition and making good damage

to the site itself) shall if undertaken by the Assignee be an extra under the contract and shall be paid for accordingly in addition to all other moneys payable by the Corporation under the contract The Assignee shall however have the option upon the happening of any war damage in excess of the total sum of £—— to terminate the contract and if it do so terminate it shall be paid for all work done and materials supplied up to the date of termination and the provisions of the contract as to the valuation of work and materials shall so far as the loss or damage permits apply.

8. The expression "war damage" means damage caused by or in repelling enemy action or by measures taken to avoid or repel enemy action or to avoid or reduce the spreading of the consequences of damage caused by or in repelling enemy action.

Form 7.

Very Concise Form of Tenancy Agreement Granted by Freeholder and Applicable to War Period; Provision Enabling Tenant to Determine Tenancy in Case of Damage to the Premises or in Case Tenant Transferred by his Employers Outside a Given Area. For use in Urgent Cases Where Tenancy is Short (*a*).

Date. Parties.

AN AGREEMENT made the —— day of —— 19— BETWEEN —— of —— in the county of —— (hereinafter called "the Landlords" which expression where the context so admits includes the reversioner for the time being immediately expectant upon the term hereby agreed to be granted) of the one part and —— of —— in the county of —— (hereinafter called "the Tenant" which expression where the context so admits includes his executors administrators and assigns) of the other part

WHEREBY it is agreed as follows—

Letting; and parcels.

1. THE LANDLORDS hereby agree to let and the Tenant agrees to take all the premises situate and known as —— in the county of —— (including any outbuildings and the garden or other ground used and enjoyed therewith and the fixtures

(*a*) Stamp *ad valorem* £1 per cent.

now in and upon the same) TO HOLD the same from the —— day of —— 19— for the term of [one] year at the yearly rent of £— by equal [monthly] instalments of £— in advance on the [first] day of [each month] throughout the tenancy the first payment to be made on the [first] day of —— 19—. Term. Rent.

2. THE TENANT hereby agrees with the Landlords as follows:— Tenant's covenants:

(1) To pay the said rent at the times aforesaid To pay rent;

[(2) To pay all general and water rates existing and future imposed upon the demised premises or the owner or occupier in respect thereof during the tenancy] [To pay rates;]

(3) To make good any damage done by the Tenant his servants family or visitors to the said premises beyond fair wear and tear and damage by fire or other inevitable accident and also to make good any stoppage of or damage to any pipes or drains caused by the Tenant his servants family or visitors and to keep the garden in a neat and proper state and condition and to keep all grass mown To make good damage;

(4) To yield up the said premises with the additions and fixtures thereto (except Tenant's fixtures) and other Landlord's fixtures subsequently added at the end of the tenancy in such repair and condition as shall be in accordance with the foregoing provisions To yield up;

(5) To permit the Landlords and their agents at all reasonable times to enter upon the said premises to execute repairs or other essential works and to examine the state of repair and condition of the said premises To permit entry to effect repairs, etc.;

(6) Not to make any alterations or additions to the said premises except by alterations or additions previously sanctioned in writing by the Landlords Not to make alterations;

(7) To use the said premises as a private dwelling-house only and not to do or suffer to be done on the demised premises anything which shall or may vitiate any usual tariff office or Lloyd's private dwelling-house policy of insurance against fire in respect of the said premises To use as private dwelling-house;

(8) Not to assign underlet or part with the possession of the Limited covenant against assignment, etc.;

whole or any part of the said premises without the consent in writing of the Landlords such consent not to be unreasonably withheld in the case of a respectable and responsible person

To permit notices and inspection for reletting, etc.;

(9) At any time within three months prior to the expiration of the said year and thereafter at any time during the tenancy to permit the Landlords or their agents to affix upon the said premises a notice for reletting or selling the same and during the same period to permit persons with written orders from the Landlords or their agents at reasonable hours of the day by appointment to view the said premises.

Not to permit nuisance.

(10) Not to do or permit anything upon the said premises which shall be a nuisance or annoyance to the Landlords or any occupier or owner of adjoining or neighbouring property.

Mutual terms:

3. IT IS MUTUALLY AGREED as follows:—

Cesser or abatement of rent in certain events;

(1) If owing to any cause (except a breach by the Tenant of his obligations) the said premises or any part thereof shall become unfit or not available for the personal occupation of the Tenant the rent or a fair proportion thereof shall cease to be payable until they are again fully fit and available for such occupation but after any such occurrence the Tenant may determine the tenancy by one calendar month's written notice expiring at any time the Landlords repaying to the Tenant the due proportion (from the date of expiry of the notice) of any rent general or water rate paid in advance (*b*).

(*b*) For the sake of conciseness we have not distinguished between unfitness of part and unfitness of the premises as a whole. The peculiar result of the Landlord and Tenant (War Damage) Act, 1939, is as follows:

(1) If the damage to the premises is not such as to render the premises as a whole "unfit" this power of determination will be valid and effective.

(2) If, however, the war damage is greater, and *is* such as to render the premises unfit as a whole the landlord cannot be deprived of his right to give the tenant a notice to elect followed by a notice to avoid disclaimer if the tenant disclaims. The highly peculiar result is that in such a case the tenant cannot rely on the power

(2) The Landlords will keep the premises wind and water tight and in such a condition as to be reasonably fit for occupation (war damage and fire excepted) — Landlords to keep premises reasonably fit for occupation;

(3) If any rent shall be in arrear for fourteen days (whether legally demanded or not) or if the Tenant shall omit to perform or observe any of his obligations hereunder or shall suffer a receiving order in bankruptcy to be made against him the Landlords may re-enter upon the said premises or upon any part thereof in the name of the whole and the tenancy shall thereupon determine but without prejudice to any claim which the Landlords may have against the Tenant in respect of any breach of the Tenant's stipulations herein contained — Proviso for re-entry;

(4) If the Tenant is required by his employers for the time being to carry out his duties day by day in any part of Great Britain other than [the Administrative County of London] then the Tenant may at any time after such requirement is notified to him give one month's notice to the Landlords in writing (expiring at any time) determining the tenancy hereby granted the Landlords repaying to the Tenant the due proportion (from the date of expiry of the notice) of any rent general or water rates paid in advance. — Power to determine if tenant transferred to another district by employers.

AS WITNESS *etc.*

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here given as enabling him to determine the tenancy on account of war damage unless such damage is so slight as not to render the premises, as a whole, unfit.

We cannot improve the position because section 21 of the Act prevents "contracting out"; but some practitioners may prefer to add after "such occurrence" the words "(other than war damage rendering the said premises unfit within the meaning of the Landlord and Tenant (War Damage) Act, 1939)".

The provision as to cesser or abatement of rent is thought to be effective, even in the case of war damage rendering the premises (as a whole) unfit.

Form 8.

Agreement between Landlord and Tenant for the Repair by the Tenant of War Damage which has Not Rendered the Premises Unfit. (Short Form) (*a*).

Parties. AN AGREEMENT BETWEEN A of *etc.* (hereinafter called "the Landlord") of the one part and B of *etc.* (hereinafter called "the Tenant") of the other part

Recitals: WHEREAS:

Lease: (1) By a lease made the —— day of —— between the Landlord of the one part and the Tenant of the other part the dwelling-house known as —— situate at —— was demised to the Tenant from the —— day of —— for a term of —— years determinable as therein mentioned at an annual rent of £—— payable quarterly

War damage: (2) On or about the —— day of —— the said premises suffered war damage but such damage did not render the premises unfit so as to bring into operation the provisions of Part II of the Landlord and Tenant (War Damage) Act, 1939

(*a*) Stamp, 6d. The Landlord and Tenant (War Damage) Act, 1939, Part I, relieves both the landlord and tenant from any liability to repair war damage, which might otherwise arise where a lease imposes on either party an obligation to repair. Where the war damage is so extensive that the premises are "unfit", Part II of the Act empowers the tenant to disclaim the lease. If he elects to retain it, he will be liable to repair; if the landlord avoids the tenant's disclaimer the landlord will have to repair. Premises are "unfit" where the demised buildings or works are "unfit for the purpose for which those buildings or works were used or adapted for use immediately before the occurrence of the war damage in question, having regard to the class of tenant likely to occupy similar buildings or works which are not unfit for that purpose, to the standard of accommodation available at the material time, and to all other circumstances". If the premises are not "unfit" within the meaning of the term in the Act neither the tenant nor the landlord can force the other to repair and neither can terminate the lease. Of necessity the definition of "unfit" is somewhat vague, and in many cases it will be difficult to determine whether the premises are unfit or not. In these circumstances the best course very frequently will be for the landlord and tenant to agree to share the cost of the repairs. This agreement proceeds on the basis of the cost being borne equally. This form was drafted before the publication of the War Damage Bill. Its provisions do not affect this agreement, but when it becomes law it must be borne in mind.

(3) It is estimated that the cost of repairing and making good the said war damage will amount to £——

Cost of repair;

(4) The Landlord and Tenant have mutually agreed that the said cost of the repair of the said war damage shall be shared between them in manner hereinafter appearing

Agreement for repair.

NOW IT IS HEREBY AGREED AND DECLARED as follows:—

1. THE TENANT shall forthwith commence and within the space of —— months from the date hereof or as soon thereafter as the circumstances of the war permit repair and make good all the war damage to the said premises known as ——.

2. THE SAID repairs shall be executed with the best materials and in a good workmanlike and substantial manner to the satisfaction of the Landlord in every respect PROVIDED ALWAYS (*b*) that if it shall prove impracticable to obtain the necessary labour or materials for the execution of such repairs owing to the war if the Tenant shall make the premises wind and water tight forthwith he may postpone the completion of the repairs until the end of the war and for three months thereafter.

3. THE COST of the said repairs shall be borne and paid by the Tenant.

Cost of repairs.

4. NO RENT shall be payable by the Tenant under the said lease for a period of —— months from the date hereof.

Reduction of rent.

5. THE TENANT (*c*) shall join with the Landlord in making the necessary application or applications to the appropriate authority or authorities for whatever compensation whether by way of insurance or government payment or otherwise as may be payable in respect of such war damage The legal and other costs and expenses including the surveyor's fees of making and negotiating the claim for compensation shall be

Application for compensation.

(*b*) It is essential to give considerable latitude to the tenant as to the time in which the repairs must be completed. While it may be difficult to get materials for complete restoration, it should be possible to get materials to do all repairs necessary to make the premises habitable where in the first instance the premises have not been rendered unfit.

(*c*) The lodging of a claim for compensation in the prescribed manner is a condition precedent to the right to claim compensation. The manner of lodging the claim will be governed by the provisions of the War Damage Bill when it becomes law.

paid by the Landlord The compensation moneys shall be paid to the Landlord (*d*) So far as such compensation moneys shall be payable in respect of the war damage the subject of this agreement they shall be applied by the Landlord first in repaying to himself the aforesaid costs and expenses incurred by him and any insurance premiums or other charges incurred in connection with the claim and secondly the balance of the said compensation moneys shall be divided equally between the Landlord and the Tenant PROVIDED ALWAYS that if the Tenant shall not have completed the said repairs and made good the war damage before the said compensation moneys are paid then the estimated cost of completing such repairs shall be deducted from the moiety of the compensation money payable to the Tenant and shall be paid by the Landlord to the Tenant on the completion of such repairs in accordance with the terms of this agreement.

Provision for further war damage.

6. IN THE event of the premises suffering further war damage exceeding £—— in amount this agreement may be determined by either party giving to the other a notice in writing In the event of such determination the Tenant shall be entitled to be paid half (*e*) of the sum he shall have actually expended hereunder on repairs for war damage out of the compensation moneys paid to the Landlord if and when these are received by the Landlord.

Provision for arbitration.

7. ANY AND every dispute difference or question which may at any time arise between the parties hereto or their respective representatives or assigns shall be referred to the arbitration of two persons (one to be appointed by each party) and this shall be deemed to be a submission to arbitration within the

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(*d*) Whatever may be the respective rights of the landlord and tenant to share in the compensation moneys they can agree to distribute it in such proportions as they think fit. The War Damage Bill authorises the assignment of the right to any payment to any person entitled to another share of such payment. In most cases it would seem that the landlord will be the proper person to receive the compensation moneys.

(*e*) If the landlord contributes to the cost of the repairs by forgoing rent the tenant can only claim to be paid out of the compensation moneys the outlay he has incurred less the amount of the rent which he has not paid. This draft proceeds on the assumption that the cost is being shared equally.

Arbitration Acts 1889 to 1934 or any statutory modification or amendment thereof for the time being in force the provisions whereof shall apply as far as applicable.

IN WITNESS *etc.*

Form 9.

Agreement between Landlord and Tenant for the Repair by the Landlord of Premises which have been Rendered Unfit by Reason of War Damage, the Parties Waiving their Rights under the Landlord and Tenant (War Damage) Act, 1939 (*a*).

AN AGREEMENT BETWEEN A of *etc.* (hereinafter called "the Landlord") of the one part and B of *etc.* (hereinafter called "the Tenant") of the other part Parties.

WHEREAS: Recitals:

(1) By a lease made the —— day of —— between the Landlord of the one part and the Tenant of the other part the dwelling-house known as —— situate at —— was demised to the Tenant from the —— day of —— for a term of —— years determinable as therein mentioned at any annual rent of £—— payable quarterly Lease;

(2) On or about the —— day of —— the said premises were rendered unfit by reason of war damage War damage;

(*a*) Stamp, 6d. (see also note (*a*) to Form 8, *ante*, p. 364). While the parties cannot agree as to the repair of war damage before it occurs (the Landlord and Tenant (War Damage) Act, 1939, s. 21), there is no legal objection to their doing so subsequently. Under Part II of the Act the whole cost of the repairs when leasehold property has been rendered "unfit" falls on the party who wishes to affirm the lease, no rent being payable from the time when a notice is served under the Act until the completion of the repairs (sections 10 and 11). It may be impossible for one of the parties to bear the entire cost and in many cases it will be convenient for the expense to be divided. This agreement proceeds on the footing that the landlord will do the repairs at his own cost, and will take all compensation moneys, the tenant, however, paying rent during the period of repair as his contribution. Where the tenant is prepared to contribute a substantial sum to the repairs, a provision must be inserted apportioning the compensation moneys between the landlord and tenant in the proportions in which they have contributed to the cost of the repairs; a clause providing for the division of such compensation moneys is to be found *ante*, p. 365.

Waiver of the Landlord and Tenant (War Damage) Act, 1939.

(3) The Landlord and Tenant have agreed to waive the rights conferred upon them respectively by the Landlord and Tenant (War Damage) Act 1939 and to affirm the said lease upon the terms and conditions hereinafter contained

NOW IT IS HEREBY AGREED AND DECLARED as follows:—

Agreement for repair.

1. THE LANDLORD shall forthwith commence and within the space of —— months from the date hereof or as soon thereafter as the circumstances of the war permit repair the said war damage to the premises to the extent of making them wind and water tight and habitable and shall within six months after the termination of the war repair and make good the said war damage to the premises with the best materials and in a good and workmanlike manner so that the premises shall be restored to the condition they were in before the occurrence of the war damage [PROVIDED ALWAYS that the obligation of the Landlord hereunder should not include any interior painting or papering or other decorative repairs].

Cost of repairs.

2. THE COST of the said repairs shall be borne and paid by the Landlord.

Payment of rent.

3. THE TENANT shall continue to pay the rent payable under the lease notwithstanding the fact that the demised premises may be in whole or in part uninhabitable PROVIDED ALWAYS that in the event of the Landlord not making the premises wind and water tight and habitable before the expiration of —— months from the date hereof no rent shall be payable by the Tenant from the expiration of the said period of —— months until such repairs are completed and the premises made habitable.

Application for compensation.

4. THE TENANT shall join with the Landlord in making the necessary application or applications to the appropriate authority or authorities for whatever compensation whether by way of insurance or government payment or otherwise as may be payable in respect of such war damage The Tenant shall permit the Landlord's surveyor or other agent to enter on the premises from time to time for the purpose of estimating the amount of the war damage for the purpose of any claim for compensation The Landlord shall pay all the costs and

expenses of making and negotiating the claim for compensation including all costs reasonably incurred by the Tenant and all compensation moneys shall be paid to the Landlord who shall be entitled to retain the same and the Tenant shall not be entitled to be paid any part thereof and the Tenant hereby assigns to the Landlord all his share and interest (if any) in such compensation moneys.

Provision for further war damage.

5. In the event of the premises suffering further war damage exceeding £—— in amount this agreement may be determined by either party giving to the other notice in writing and the parties shall then be entitled to exercise all rights and remedies conferred upon them respectively by the Landlord and Tenant (War Damage) Act 1939.

Provision for arbitration.

6. Any and every dispute difference or question which may at any time arise between the parties hereto or their respective representatives or assigns shall be referred to the arbitration of two persons (one to be appointed by each party) and this shall be deemed to be a submission to arbitration within the Arbitration Acts 1889 to 1934 or any statutory modification or amendment thereof for the time being in force the provisions whereof shall apply as far as possible.

In witness *etc.*

Form 10.

Licence by a Landlord to His Tenant to Erect an Air-raid Shelter on the Demised Premises (*a*).

Parties. THIS LICENCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord") of the one part and B of *etc.* (hereinafter called "the Tenant") of the other part

Recitals: WHEREAS:

Lease; (1) By a lease made the —— day of —— between the Landlord of the one part and the Tenant of the other part the dwelling-house known as —— situate at —— was demised to the Tenant from the —— day of —— for a term of —— years determinable as therein mentioned at an annual rent of £—— payable quarterly and the Tenant thereby covenanted not at any time during the said term without the licence of the Landlord first obtained to erect or suffer to be erected any new buildings on the premises or to make any alteration or addition whatsoever in or to the premises thereby demised without such licence as aforesaid either externally or internally

Agreement to the erection of an air-raid shelter. (2) The Landlord has agreed with the Tenant to grant to him a licence to erect an air-raid shelter in the said demised dwelling-house and to make and execute the works and alterations in the demised premises necessary for the erection of such shelter in the manner and upon the terms and conditions hereinafter contained

NOW IT IS HEREBY AGREED AND DECLARED as follows:—

Licence to erect shelter. 1. THE LANDLORD hereby grants unto the Tenant full licence and authority forthwith to erect an air-raid shelter on the portion of the demised premises coloured pink on the plan

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(*a*) Stamp, 6d.; or if under seal, 10s. Many leases contain a restriction on the erection of new buildings by tenants. Where this is the case, a licence from the landlord is required if an air-raid shelter is to be erected, for as yet a tenant has no legal right to erect a shelter as and where he pleases regardless of the covenants of his lease. Having regard to the provisions of the Landlord and Tenant Act, 1927, s. 19 (2), where a reasonable scheme for a shelter is proposed it does not seem that the landlord can refuse to sanction it. The present tendency is towards the erection of indoor shelters; such shelters must seriously affect the amenities of a house, and the landlord should insist on the tenant undertaking to remove the shelter.

annexed hereto according to the specifications contained in the Schedule hereto and to make and execute all works and alterations to the demised premises more particularly described in the said Schedule.

2. In consideration of the licence hereinbefore given the Tenant hereby undertakes with the Landlord as follows:— Undertaking by tenant:

(i) The Tenant (*b*) will submit the said plans and specifications to the appropriate local authority or authorities for their approval and will not begin to erect the said shelter until the approval of the authority or authorities has been duly obtained To submit plans to local authority;

(ii) The Tenant will at the end or sooner determination of the said lease or within six months after the end of the present war whichever shall first happen at the cost of the Tenant remove the said shelter and make good all damage done to the demised premises by the erection and removal of the said shelter and in particular will restore all floors cut or injured and will substantially brick up and rebuild all openings cut in walls in such manner as the Landlord shall direct and to his complete satisfaction Provided always that in the event of the said lease determining before the termination of the present war the Tenant shall have the option of paying to the Landlord the sum of £—— in satisfaction of his liability to remove the said shelter and on payment of the said sum of £—— the liability of the Tenant hereunder shall cease and determine. To reinstate.

As witness *etc.*

The Schedule.

[*To contain particulars and specifications of the proposed shelter.*]

(*b*) Plans for the erection of a shelter should be submitted to the local authority, and the landlord should require this to be done. It is highly desirable that the local authority should be informed, as in this way some check may be kept on the building of inadequate shelters. If the local authority is consulted the landlord cannot be blamed should subsequent events prove the shelter to be inadequate.

Form 11.

Assignment of Leasehold Premises: Original Lessors (Brewers) Joining to take Covenants by Assignee (*a*).

Drafted by E. O. Walford, LL.D.

Date. Parties.

This assignment is made the —— day of —— 19— between —— of —— in the county of —— (hereinafter called "the Vendor") of the first part [Brewers] whose registered offices are situate at —— (hereinafter called "the Company") of the second part and —— of —— in the county of —— (hereinafter called "the Purchaser" which expression shall include his executors administrators and assigns where the context permits) of the third part

Recitals:

(1) Lease;

Whereas:

(1) By a Lease or underlease dated the —— day of —— 19— made between the Company of the one part and —— (thereinafter referred to as "the Lessee") of the other part For the consideration therein mentioned All that —— was demised unto the Lessee his executors administrators and [permitted] assigns for the term of —— years from the —— day of —— 19— subject to the yearly rent of £— [and other contingent rents] thereby respectively reserved and to the covenants and conditions therein contained and on the part of the Lessee his executors administrators and [permitted] assigns to be paid observed and performed And especially to a certain covenant [*inter alia*] that the Lessee should not nor would part with possession of the demised premises or any part thereof or

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(*a*) The burden of some covenants commonly required by brewers from their tenants in connection with tied leases does not run with the land (or term) so as to bind assignees. Hence the necessity for provision in such leases for the giving of direct covenants by assignees or undertenants.

This form is based to some extent on a form employed by Messrs. Crossman, Block & Co., whom we have to thank for their courtesy in permitting the use of their form. There are, however, substantial differences between the form here printed and the form furnished by Messrs. Crossman, Block & Co. As to the covenants by the purchaser, it will be appreciated that these will depend upon the provisions in the original lease. The form may therefore be of use as an indication of the provision to be made in tied leases for direct covenants by assignees or others deriving title under the lessee.

of those presents nor assign underlet dispose of or otherwise part with charge or incumber all or any part of his interest in the premises thereby demised or in any part thereof without the previous consent in writing of the Company And that every Assignment underlease or other disposition should contain covenants on the part of the assignee or underlessee similar in all respects to that covenant and the covenant with respect to the purchase and sale of malt liquors thereinbefore contained

(2) By divers mesne assignments and other acts in the law and ultimately by an Assignment dated the —— day of —— 19— made between —— the said premises comprised in and demised by the hereinbefore recited Lease (hereinafter referred to as "the demised premises") became vested in the Vendor for all the unexpired residue of the term granted by the said Lease subject nevertheless to the said rents covenants and conditions (2) Vesting in vendor of lease;

(3) By a Mortgage [also] dated the —— day of —— 19— made between the Vendor of the one part and the Company of the other part the demised premises TOGETHER with the goodwill of the business carried on thereon were mortgaged to the Company for securing the repayment of the sum of £— therein mentioned together with interest thereon the demised premises being sub-demised to the Company for the residue of the term granted by the hereinbefore recited Lease less the last ten days thereof (3) mortgage;

(4) The Vendor has with the consent of the Company contracted with the Purchaser for the sale to him of the demised premises TOGETHER with the goodwill of the business carried on thereon for the sum of £— out of which it has been agreed that the sum of £— now owing by the Vendor to the Company upon the security of the hereinbefore recited Mortgage shall be paid as hereinafter mentioned (4) Agreement for sale.

NOW THIS DEED WITNESSETH as follows:—

1. IN PURSUANCE of the said Contract and in consideration of the sum of £— now paid by the Purchaser to the Company at the request and by the direction of the Vendor (the receipt of which said sum in full discharge of all moneys now owing by the Vendor to the Company upon the security aforesaid they the Company do hereby acknowledge) and of the sum of £— Assurance of demised premises and goodwill.

the balance of the said purchase money now paid by the Purchaser to the Vendor the payment by his direction of the said sum of £— to the Company and the receipt by him of the said sum of £— (making together the full purchase money of £—) the Vendor doth hereby acknowledge the Company as Mortgagees at the request and by the direction of the Vendor do hereby surrender and release and the Vendor with the consent (hereby testified) of the Company as Beneficial Owner doth hereby assign and confirm and the Vendor as Beneficial Owner doth hereby with the consent of the Company (which they have agreed to grant in consideration of the Purchaser entering into such covenants as are hereinafter contained and which consent is testified by their sealing these presents) assign transfer and set over unto the Purchaser his executors administrators and assigns the demised premises TOGETHER with —— (*b*) and TOGETHER ALSO with the goodwill of the business carried on upon the demised premises TO HOLD all the premises hereby assigned unto the Purchaser his executors administrators and assigns as to the demised premises for the residue now unexpired of the term granted by the hereinbefore recited Lease subject nevertheless to the payment of the rent thereby respectively reserved and to the observance and performance of the covenants and conditions therein contained and on the part of the Lessee his executors administrators and permitted assigns henceforth to be paid observed and performed And as to all other the premises hereby assigned absolutely and as to all the premises hereby assigned freed and absolutely discharged from the hereinbefore recited Mortgage and all moneys thereby secured and all claims and demands thereunder to the intent that the derivative term created by the hereinbefore recited Mortgage shall forthwith

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(*b*) It is necessary to insert here particulars of any option of purchase of the reversion, and if there is an option of renewing the lease it will be desirable to insert particulars in order to avoid any doubt as to the intention to assign the benefit of it. Moreover, there are occasionally other covenants by the lessor the benefit of which do not pass to an assignee without express assignment. It will therefore be desirable to include an express assignment of the benefit of any covenants by the lessor unless it is absolutely certain that the benefit of them runs with the term.

merge and be extinguished in the term granted by the hereinbefore recited Lease

Covenant by purchaser to pay rent and perform covenants of lease.

2 (*c*). THE PURCHASER doth hereby covenant with the Vendor that he the Purchaser his executors administrators and assigns will henceforth pay the said yearly rents and observe and perform all the covenants and conditions in and by the said recited Lease reserved and contained and henceforth on the part of the Lessee to be respectively paid observed and performed and will keep the Vendor his estate and effects indemnified from and against all actions suits losses damages expenses costs claims and demands whatsoever on account of the non-payment of the said rents or any part thereof or the non-observance or non-performance of the said covenants and conditions or any of them.

Special covenants by the purchaser.

3. IN PURSUANCE of the covenant to that effect contained in the hereinbefore recited Lease and for the consideration aforesaid the Purchaser doth hereby covenant with the Company that he the Purchaser will during the residue of the term granted by the hereinbefore recited Lease deal exclusively with the Company or their successors in business or nominees for all beers which shall be sold disposed of or consumed in or upon or from or about the demised premises or any part thereof or which shall be brought thereon to be so sold disposed of or consumed and will not on any pretence whatever at any time during the said term (except with the previous consent in writing of the Company) buy take in receive have in his possession or consume sell or dispose of either directly or indirectly or permit to be brought taken in received retained consumed sold or disposed of either directly or indirectly in or upon or from or about the demised premises or any part thereof any beers other than such as shall have been *bona fide* purchased or taken of or supplied by the Company or their successors in business or nominees and the fact that any barrel or bottle or other vessel used for the purpose of containing any of the beers aforesaid other than such as are supplied by the Company their successors or nominees is upon the demised premises

(*c*) The form of these and the subsequent covenants by the purchaser will, of course, depend upon the terms of the lease which is being assigned.

(whether empty or not) shall be *prima facie* evidence of a breach of this covenant

Provided that this covenant shall only apply during such period or periods as the Company or their successors in business or their nominees as aforesaid shall be willing and able to supply the Purchaser at the fair current price thereof.

4. IT IS EXPRESSLY AGREED AND DECLARED as follows:—

(1) That the term "fair current price" shall when so ascertainable be the price for the time being obtaining between the Company their successors in business or nominees and their respective tied tenants

(2) That the Purchaser will not part with possession of the demised premises or any part thereof or of the said Lease or underlease nor assign underlet dispose of or otherwise part with charge or incumber all or any part of his interest in the demised premises or in any part thereof without the previous consent in writing of the Company nor at any time during the term granted by the hereinbefore recited Lease apply for or make any endeavour to obtain any different or additional licence in respect of the demised premises without such consent as aforesaid

(3) That the Purchaser shall and will within two calendar months next after the execution or making of any assignment underlease or disposition and also of any charge or incumbrance of or upon the demised premises or any part thereof give notice thereof to the Company or their solicitors or agent for the time being by leaving with them a true copy of every such assignment or underlease disposition charge or incumbrance and paying therewith a fee of [£2 2s. 0d.] for registration

(4) That every such Assignment underlease or disposition and also every Assignment or disposition by any mortgagee or chargee incumbrancer or other person deriving title under the Purchaser shall contain covenants on the part of the assignee underlessee or disponee similar in all respects to the last two foregoing covenants and the covenant with respect to the purchase and sale of beers hereinbefore contained

(5) That the Purchaser shall not nor will do or suffer to be done any act whereby any licence or licences now attached

to the said premises may be imperilled or forfeited or the renewal thereof jeopardised or withheld And further will not except with the consent of the Company place nor permit nor allow to be placed upon or suspended from or supported by the said premises or any portion thereof internally or externally any signs boards bills posters or advertisements poles wires or stays or any placard or erection whatsoever except the usual trade boards of the Company (which the Company shall be entitled to erect and maintain on the premises) nor display (to the injury of the Company or to the exclusion partially or otherwise of their goods) the goods of any other trader

(6) That the Purchaser (here meaning the Purchaser personally or other the individual person or persons in whom for the time being the term granted by the hereinbefore Lease is vested) will at all times during the unexpired term granted by the said Lease personally reside upon the demised premises

Provided that if the said term is still vested in the Purchaser (as hereinbefore defined) at the date of his death neither the non-residence of the Purchaser nor the non-residence of his executors or administrators in the demised premises shall be deemed to be a breach of this covenant

(7) That if in the opinion of the Company it shall be necessary or proper at any time or from time to time during the residue of the said term granted by the hereinbefore recited Lease to alter or rebuild the demised premises or any part thereof or to make any structural or substantial improvements alterations or additions therein or thereto (hereinafter called such works) (i) in order to comply with any requirement or direction of the Licensing Justices under section 72 of the Licensing (Consolidation) Act 1910 or any other Act for the time being in force or (ii) which ought to be done with a view to preserve or obtain any subsisting licence or the renewal of any subsisting licence or for any other sufficient reason then and in any such case it shall be lawful for the Company their agents and workmen to execute and do such works and to enter upon the demised premises for that purpose and that the Purchaser will pay to the Company within one month after demand therefor such a share of the expense incurred by the Company in executing and

doing such work as shall be agreed upon between the Company and the Purchaser or shall in default of agreement be fixed by the President for the time being of the Association of Valuers of Licensed Property or some person nominated by him who in determining the sum to be paid by the Purchaser shall have regard to the value of the interest of the Purchaser in the demised premises immediately prior to the execution and doing of such work as compared with the interest of the Company.

(8) That the Purchaser will throughout the residue of the said term use his best endeavours to supply all beers to his customers in good sound and bright condition and of the same strength and gravity as received from the Company and will take all steps that may be necessary to keep his cellars and stores and all vessels pipes and engines in clean condition and in good repair.

Acknowledgment of the Company's right to production of this Assignment.

5. THE PURCHASER hereby acknowledges the right of the Company to production of this Assignment and to delivery of copies thereof.

Certificate as to consideration.

[6. THE PARTIES hereto hereby certify that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the consideration exceeds £500 (*d*).]

IN WITNESS *etc.*

Form 12.

Clause to be Added to Every Power of Attorney to which the Evidence and Powers of Attorney Act, 1940, Does not Apply (*a*).

I [*donor of power of attorney*] HEREBY DECLARE that this power of attorney is not an instrument to which section 3 of the Evidence and Powers of Attorney Act 1940 applies.

(*d*) If consideration does not exceed £500.

(*a*) The Evidence and Powers of Attorney Act, 1940, applies to powers executed after June 13, 1940, outside the United Kingdom by members of His Majesty's forces or by British subjects in enemy territory (sub-section (5)). Such powers, if they do not comply with the requirements of the section, are of no effect (sub-section (1)). A statement that the power is not one to which the section applies should be inserted in every

Form 13.

Trusts of a Testator's Residuary Estate giving Powers of Appointment to his Trustees in Favour of his Widow and Descendants to Enable Them to Meet any Difficulties Arising by Reason of the War with a Request to Give Effect so far as Practicable to the Trusts of the Will of the Testator which he has Revoked (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

THE TRUSTEES shall hold my residuary estate and the income thereof as from my death upon the trusts following that is to say:—

(A) IN TRUST for all or such one or more exclusively of the others or other of the following persons namely my wife and my descendants (whether living at or born after my death) and every person whom any descendant of mine has married or may marry before or after my death (all which persons and

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power which is outside the scope of the section, as such statement is conclusive evidence of that fact (sub-section (3)). The section is considered *ante*, p. 185.

(*a*) It is becoming increasingly difficult for many testators to make a will expressing their wishes, and this for two reasons: First, it may be impossible to estimate what will in fact be the value of the estate after payment of death duties; secondly, with the younger members of the family in the armed forces it is now inexpedient to give vested interests which in fact may not be enjoyed by the intended beneficiary owing to death on active service. This form is intended to meet the case where either owing to uncertainty as to his financial position, or as to the beneficiaries to take, the testator wishes not to create trusts of a binding character which will come into operation on his death. By giving a power of appointment to his trustees for twenty-one years after his death he enables them to distribute the estate in accordance with his wishes, the needs of his family for the time being and the financial capacity of the estate. This form of power enables the trustees to raise capital and pay it to the widow if the income is insufficient for her needs. Capital so paid over to her will not be income and subject to income tax, as would be the case if an annuity were given to her charged on corpus, when capital applied in paying the annuity would be subject to income tax: *Brodie's Trustees* v. *I. R. C.*, 17 T. C. 432; *Williamson* v. *Ough*, [1936] A. C. 384. Further, if any beneficiary dies, the share which the testator would have wished him to take can be appointed to his family if he leaves one, or the other beneficiaries if he does not. This form can only be used to advantage when the testator has relatives or friends on whose intelligence and integrity he can rely to give effect to his wishes. This power of appointment could not well be given to a trust corporation.

my wife and descendants being hereinafter together referred to as "the Beneficiaries") at such age or time or respective ages or times if more than one in such shares and for such interests and with such trusts (if any) for their respective benefit and such provisions (if any) for their respective advancement and maintenance and education at the discretion of the trustees or any other person or persons as the Trustees shall by any deed or deeds (revocable or irrevocable) executed within twenty-one years from my death appoint but so that no power of revocation reserved in any such appointment shall be exercisable after the expiration of such twenty-one years.

(B) In addition to the foregoing power and by way of extension thereof the Trustees may (at any time or times during the period of twenty-one years from my death and without executing any formal deed of appointment) as to all or any part or parts of the property for the time being constituting or representing all or any part or parts of my residuary real and personal estate and the income thereof as from my death either (i) transfer or raise and pay the same to any one or more of the Beneficiaries for his her or their absolute use and benefit or (ii) raise and pay or apply the same for the advancement or otherwise for the benefit of all or any of the Beneficiaries in such manner as the Trustees shall think fit (but this power numbered (ii) shall not be exercised in favour of any person after he or she has attained the age of twenty-one years without his or her consent in writing).

(C) (i) The foregoing powers may be exercised only whilst the Trustees are at least two in number or is one person who is not one of the Beneficiaries

(ii) Both or either of the foregoing powers may be exercised in favour of any person or persons notwithstanding that he she or they may be some one or more or all of the Trustees

(iii) The Trustees may at any time or times wholly or partially release both or either of the foregoing powers as to all or any part of the property subject thereto and every such release shall bind them and their successors in office

(iv) Income received by the Trustees and not appointed or otherwise disposed of by the Trustees under the foregoing powers

within six months after receipt thereof shall be free from such powers and be dealt with as hereinafter provided.

(D) IN DEFAULT of and until and subject to any exercise of the foregoing powers the Trustees shall hold my residuary estate upon the trusts following that is to say:—

(i) Upon trust for my wife during her life and

(ii) Subject thereto upon the same trusts as would have been applicable thereto under the Administration of Estates Act, 1925, if I had died wholly intestate and my wife had predeceased me.

(E) (*b*) I make the foregoing dispositions because of the uncertainty of what the political and financial position may be at and after my death and I request (but do not in any way require) my wife and descendants to remember that my will (dated the —— day of —— 19— and revoked by this my will) contains the dispositions that I would have made had the times been settled and normal and to give effect to such dispositions so far as reasonably practicable.

Form 14.

Short Will to Meet the Case of the Principal Beneficiary Dying at the Same Time as the Testator, With Provisions for Distribution Where a Legatee has Disappeared (*a*).

I, of *etc.* DECLARE this to be my last will.

1. I HEREBY revoke all wills and testamentary dispositions heretofore made by me.

2. IN the event of my wife surviving me for a period of two months from my death I appoint her to be sole executrix of this my will and I devise and bequeath to her all my property both real and personal absolutely.

Gift to wife if she survives testator fo two month

(*b*) The testator should either leave his revoked will or a memorandum of his wishes to guide but not bind his trustees in exercising the power given to them.

(*a*) This will is intended to meet the difficulties which may arise where several members of a family live together and are consequently liable to be all killed at the same time should their home be bombed. Under s. 184 of the Law of Property Act, 1925, where two or more persons die in circumstances rendering it uncertain who survived the other, for all

3. In the event of my wife dying before the expiration of two months from my death I WILL AND DECLARE as follows:—

(i) I APPOINT X of *etc.* and Y of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will.

(ii) I BEQUEATH the following pecuniary legacies (free of duty) namely:— [*Here set out legacies*].

Trusts in the event of wife not surviving.

(iii) I GIVE all my property both real and personal not otherwise disposed of by this my will unto my Trustees upon trust to sell the same (with power to postpone sale) and out of the moneys to arise from such sale and my ready money to pay my funeral and testamentary expenses death duties and debts and legacies.

Gift of residue.

(iv) My Trustees shall stand possessed of the residue of the said proceeds of sale (hereinafter called "my residuary estate") in trust to pay and divide the same equally between such of my nephews and nieces C, D, E and F as shall be living at the expiration of two months from my death as tenants in common in equal shares.

(v) (*b*) If my Trustees are unable to trace any legatee here-

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purposes affecting the title to property, they are presumed to have died in order of seniority. This presumption has frequently during the war operated oppressively. For example, where a husband has left all his property to his wife and they are killed together, if she is the younger, she is under s. 184 presumed to have survived him, with the result that the husband's property passes under his will to her and is then distributed as part of her estate. If she has died intestate, this means that the husband's estate passes to his wife's next-of-kin, a result which is generally not intended by the husband. Where a husband or other member of a family is leaving property absolutely to any person with whom he lives it is in the circumstances of the present war generally advisable to make the gift conditional on the beneficiary surviving the testator for a short period. Two months seems a reasonable time. There is generally no objection to postponing administration and distribution for this period, and where the beneficiary and testator have been injured together the period is sufficient for it to be reasonably certain that the beneficiary will not also die.

(*b*) In a certain number of cases as a result of war service or bombing it may not be possible to discover the whereabouts of a beneficiary or whether he was living at the death of the testator. In such a case, most testators would not wish their estate to be put to the expense of an inquiry as to whether the beneficiary is alive, and this clause is designed to enable the interest of the beneficiary to be retained and distributed after the war on the footing that he predeceased the testator. If a beneficiary does not appear within two years of the termination of the war there generally will be no hardship in distributing his legacy on the footing that he is dead.

under within one year of my death and if it be then uncertain whether such legatee was living at the expiration of the said period I DIRECT my Trustees to retain the legacy or share of residue of such legatee and to invest the same and any income therefrom in any investments for the time being authorised by law for the investment of trust funds and my Trustees shall stand possessed of such investments and of the income thereof upon trust to pay and transfer the same to the legatee to whom the same was bequeathed when such legatee shall be found and in the event of such legacy or share of residue not being claimed within seven years from my death or within two years from the termination of the present war whichever shall first happen my Trustees shall advertise in *The Times* and in any other newspapers my Trustees may select for such legatee and in the event of such legatee not claiming his or her legacy or share of residue within four months of the publication of the last of such advertisements the legacy or share of residue of such legatee shall sink into and form part of my residuary estate and be distributed on the footing that such legatee died before the expiration of two months from the date of my death and I DIRECT that the cost of such advertisements shall be payable out of the said investments or income representing such legacy or share of residue AND I FURTHER DECLARE that my Trustees shall not be liable to any person of whose claim they shall not have had notice at the expiration of the said period of four months.

(vi) [*Power of professional trustee to charge*].

IN WITNESS *etc.*

Form 15.

Letter to Trustees who are to Hold on Secret Trusts Communicated to Them Prior to Gift to Them by Will of a Sum to be Held on Secret Trusts (Not Incorporable in the Probate but Binding on the Donees) (*a*).

To [*secret trustees*]

1. I AM PROPOSING by my last will to leave to you or

(*a*) Testators occasionally announce that they desire to make provision for a certain person without disclosing the arrangement in the will. We are not ashamed to say that when this happens we are torn 'twixt terror, duty, and a strong desire to give *Punch's* advice to those about to marry—"Don't!" Marriages may go wrong occasionally; but secret trusts go wrong even more frequently by emerging into the full blaze of noon when (as the Irishman said) they should have hid their light under a bushel.

What is the law on the subject?

S. 53 (1) of the Law of Property Act, 1925 (replacing ss. 7 and 8 of the Statute of Frauds), requires that a declaration of trust respecting any *land* or any interest therein should be evidenced by "some writing signed by some person who is able to declare such trust or by his will". On the other hand it is declared by sub-s. (2) that this section does not affect the creation of (*inter alia*) implied or constructive trusts. If land is conveyed to another person as a trustee and he knows that he is a trustee for X he cannot plead s. 53 and claim that he is beneficially entitled to it: *Rochefoucauld* v. *Boustead*, [1897] 1 Ch. 196. (We might almost be tempted to observe that, if this is so, s. 53 (1) means nothing; but that would hardly be justified.)

In *Blackwell* v. *Blackwell*, [1929] A. C. 318, a learned Lord, after observing (i) that a testator cannot rescind a power of making future unwitnessed dispositions by naming a trustee and leaving the purposes of the trust to be supplied afterwards, and (ii) that a legatee cannot give testamentary validity to an unexecuted codicil by an indefinite trust never communicated to him in the testator's lifetime, proceeded later to say that "to hold otherwise would indeed be to enable the testator to 'give the go-by' [*sic*] to the requirements of the Wills Act".

Yet *Blackwell* v. *Blackwell*, *supra*, itself shows how the testator *can* give the go-by to the Wills Act, and those about to deal with secret trusts will do well to read the judgments. Here we can only summarise the position as it appears from the more important cases.

GIFT BY WILL "TO A AS TRUSTEE".

We refer here to cases in which the gift is to A as trustee, but the nature of the trust is either not mentioned or not fully disclosed on the face of the will itself.

In such a case, it does not matter whether A has or has not promised to hold the property upon trust. The question is whether the trust has been communicated to him at the time when the will was made or previously: *Blackwell* v. *Blackwell*, *supra*. If not, the particular trust

the survivors or survivor of you (*b*) in the event of [*secret beneficiary*] surviving me the sum of —— pounds (£——) [free of duty].

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intended by the testator will fail. Yet A cannot keep the property for his own benefit. It has been given to him as trustee: he will therefore have to hand it over to the testator's personal representatives: *Boyes* v. *Carritt* (1884), 26 Ch. D. 531.

It is hardly necessary to say that if the trusts are declared later by a subsequent codicil duly signed and witnessed (as distinct from a letter or other document not executed as a will) the trusts will be effective; but this has nothing to do with secret trusts.

Verbal Instructions Precarious.

Let us suppose that the trusts have been communicated to A either verbally or in writing, at the appropriate time. The trusts may then be effective. But if the communication is verbal difficulties may arise. For if the testator and A are the only persons who know that the trust is in favour of (say) a Home for Dogs and A predeceases the testator or dies very soon afterwards, it is likely enough that the story would end—"And so the poor dogs had none!" A might even have been thoughtful enough to leave a letter or a statutory declaration or purported affidavit as to the terms of the trust; but this would not give the donee even "a dog's chance", except where there is disclosed a "general charitable intent" enabling the Court to order that a scheme be prepared: see *Re Gardner*, [1936] 3 All E. R. 938. Nothing but a written (or mechanically produced) memorandum of some sort, existing before or concurrently with the signing of the will, and put forth or identified in some way by the action of the *testator*, would appear to overcome a difficulty of this kind. And when we say "put forth" we do not mean published, but rather prepared or brought into existence for the purpose of evidencing the testator's intentions. The term "identified" would cover a case in which a document has been prepared by a solicitor pursuant to the testator's instructions and bears a date not later than the date of the testator's will and states in the testator's handwriting or above the testator's signature that the document contains the terms on which the property is to be held by A. It would also cover a similar unsigned document or documents provided that it could be identified satisfactorily as the document which was intended to set out the trusts on which the property was intended to be held: cf. *Re Saxton*, [1939] 2 All E. R. 418. We venture here to emphasise the fact that in the case with which we are now dealing the will contains no reference to the written evidence or record of the terms upon which the trustee A is to hold the property. It is merely stated in the will that he is to take the property as trustee.

Incorporation.

We are assuming that the testator desires to be secretive; but if we are not extremely careful we shall find that the trust has become quite public. A few words in the will may make all the difference, owing to the rules concerning the incorporation of documents in probates. It is

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(*b*) See note (*b*) on p. 388.

2. Although no trust in favour of the said [*secret beneficiary*] (hereinafter called "the Beneficiary") is declared by the said will all moneys which become available to you or to the survivors or survivor of you and the personal

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likely enough that the testator will instruct his solicitor to give the fund which is intended to be administered for the benefit of the secret beneficiary to the trustees upon trust to deal with it "in accordance with the letter which I have handed to them". If this is done the secret will almost inevitably be out; for once the letter is traced it will be incorporated in the probate for all the world to see: *Van Straubenzee* v. *Monck*, 32 L. J. P. 21; *University College of North Wales* v. *Taylor*, [1907] P. 228; [1908] P. 140. There are exceptional cases in which a document which is thus incorporated in the will is not incorporated in the probate, *e.g.*, where it is very bulky, or is properly in the custody of a third party who refuses to part with it. However, the testator frequently makes the secret gift to his executors and trustees and in such cases, unless the directions are very voluminous, the trusts will stand revealed.

In order to consider how to avoid the incorporation of the secret directions, it is as well to determine under what conditions those directions will be incorporated. We have already noted that only instructions given before or at the date of the will can be incorporated in the probate: *Blackwell* v. *Blackwell*, *supra*. The other requirement is that the will (or codicil) must refer to the memorandum or other document expressly so as to identify it as a document then in existence. Thus a reference to "any memorandum amongst my papers written or signed by me" might refer to future as well as existing memoranda, and such memoranda, even if shown to be in existence at the date of the will, cannot be incorporated (as in the *University College Case*, *supra*). So, if the testator avoids all references to written instructions or directions "already handed to" the trustees, and refers instead to "any written instructions which I may give to my trustees", or employs the formula used, as above mentioned, in the *University College Case*, we need not fear that his secret instructions will be incorporated in the probate; but will the secret trusts be effective?

Essentials for Trust.

The essentials in connection with incorporation are not identical with those which govern the creation of a secret trust. Where property is given by will to A "as trustee", the trusts are normally effective, as we have said, if the trusts are communicated to A before or at the same time as the will is made, and not afterwards: *Blackwell* v. *Blackwell*, *supra*. It is tempting to deduce that if such communication has been made to A, a reference in the testator's will (in connection with the gift) to "any instructions which I may give" or to the disposal of the property among such persons as may be notified to the donee trustee by the testator, will not affect the validity of the trusts already communicated to A. We should, however, be in error in making this deduction, for this very point was in issue a few years ago in the case of *Re Keen*, [1937] 1 All E. R. 452. There a sum was given to trustees to be "disposed of by them among such person persons or charities as may be notified by me to them or either of them during my lifetime". Although the testator had in

representatives of the last survivor of you by virtue of such gift shall be held upon trust to apply the same in accordance with the terms of this memorandum.

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fact communicated to the trustees the necessary particulars before the date of the will, the Court held that the trust failed because it would be inconsistent with the terms of the will to admit evidence of trusts communicated to the trustees before the will, having regard to the fact that the clause in the will referred (as the Court held) exclusively to matters to be notified to the trustees after the date of the will.

It appears to have been deduced from this case in certain quarters that where property is given by will or codicil "to A as trustee" the trust must not only be communicated to A at or before the execution of the will but the fact that this has been done *must appear in the will or codicil* in order that the trust should take effect. We do not think that the italicised requirement is justified. *Re Keen* appears merely to show that where the will refers to future or proposed trusts the Probate Court cannot receive evidence to show that the trusts have already been communicated by the testator.

So far we find many difficulties and doubts. Is there any sure means by which the testator can not only keep the cat within the bag, but also establish a binding but secret trust?

Gift to A, Simpliciter.

Although not a legal maxim, the best motto in connection with trusts which are not to be set out in full in a will is, "Least said soonest mended". If the gift is made to the persons who are intended to administer it in favour of the secret beneficiary, without specifying that they are to be trustees, it is clear from what has already been said that no instructions which are in fact given to those persons cannot possibly be incorporated in the probate. It is also clear on recent as well as old authority that if the testator has informed those persons that the gift is intended to be held for the benefit of X on terms communicated to them during the testator's lifetime, evidence of the trust in favour of X may be received, and such trust, if lawful, will be enforced: *Russell* v. *Jackson*, 10 Ha. 204; *Wallgrave* v. *Tebbs*, 2 K. & J. 313; *McCormick* v. *Grogan*, L. R. 4 H. L. 82; *French* v. *French*, [1902] 1 Ir. R. 172 (H. L.); *Re Williams*, [1933] 1 Ch. 244.

Since *Re Keen*, *supra*, it can be said that there will be a valid trust if the terms of the trust are placed in a sealed envelope and handed to the trustees, they undertaking to carry out the trust, but without knowing its terms. Indeed it seems that the trust would be effective whether the trustees agreed to carry out the terms of the trust or not; for they cannot take beneficially, and a trust does not fail for want of a trustee.

Best Method.

What is the best plan to adopt? It is suggested that the surest way of giving effect to the testator's desire to create a secret trust is to proceed as follows:—

(1) If possible, to give the trust fund to the Public Trustee or a bank (rather than individuals) to administer.

3. You will invest the said sum of —— pounds (£——) in or upon any investments which would be authorised investments under my last will (with power to vary or transpose investments) and will hold the net income produced by such investments upon protective trusts for the Beneficiary during her life And subject as aforesaid you will hold all moneys received by you by virtue of the said gift and the investments

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(2) To see that the testator's memorandum is clear, and in such a form that the persons who are to deal with the secret trust can give legal effect to it.

(3) To provide for a copy to be signed by the testator and handed to the trustees or each trustee, and a duplicate acknowledging receipt of the original memorandum and undertaking as to the trusts to be obtained from the trustee or trustees and handed to the secret beneficiary and also if possible to the executors of the will if they are not also the secret trustees.

(4) The gift should be made by the will to the trustee or trustees (preferably more than one if not the Public Trustee or a trust corporation) *without any reference to a trust or memorandum.*

Adding to Trust Fund.

If the testator wishes to add to the trust fund, *Re Colin Cooper*, [1939] Ch. 580, and 811—C.A., shows how this should not be done. The testator having previously informed one of two persons of the trusts upon which they were to hold the sum of £5,000, gave that sum by his will to those persons, stating in the will that the trusts had been communicated to them. The Court of Appeal appears to have been satisfied that communication to one trustee was sufficient, for no comment on that point was made. Later the testator made a further will by which he revoked the earlier will, and stated that the £5,000 given by the will now cancelled was to be increased to £10,000, the trustees "knowing my wishes concerning the same". It was held that the secret trusts were not effective in respect of the £10,000, but only in respect of the £5,000 mentioned in the previous will and directions, for no communication had been made to the trustees at the date of the will in respect of the further £5,000.

It will be seen that an additional advantage of making no reference to any memorandum or trust in the gift which is contained in the will is that the testator can validly give such instructions as he may desire before or after the will. Consequently, he can also change the trusts by substituting and communicating to the trustees new instructions. Here again an acknowledgment by the trustees of the new instructions should be obtained and handed to the secret beneficiary.

(*b*) It should be pointed out to the testator that if all the secret trustees are individuals and die, he must make a gift by a codicil to new trustees and obtain from them the written acceptance of a similar

representing such moneys [upon the trusts declared by my last will or any codicil thereto concerning my residuary estate.]

[4. (*c*) NOTWITHSTANDING THE foregoing provisions you are to be entitled to draw and retain out of the said sum of —— pounds (£——) which I am proposing to give you by my will all proper professional charges for all work done by any of you or by any firm in which any of you may be interested as partner or otherwise in relation to the execution of the provisions hereinbefore contained and the foregoing provisions shall be read and construed subject to such deductions as may properly be made by you pursuant to this present clause.]

5. THIS MEMORANDUM is to bind you and the survivors of you from time to time and the personal representatives of the last survivor of you but not the estates of the first —— of you who shall die except to the extent of any breach of its terms which you may respectively commit during your respective lives.

6. NOTWITHSTANDING THE references hereinbefore contained to the sum of £—— it has been agreed between us that the terms of this memorandum shall apply to any smaller or larger sum and to any investments or property of whatsoever nature which I may give to you or the survivors or survivor of you [or to any one or more of you as individuals] [except the gift

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memorandum. Otherwise the gift may lapse and the whole scheme will fall to the ground.

For this reason it will be very desirable wherever possible to make the gift to the Public Trustee (if he will accept the trust) or to some other trust corporation.

(*c*) To be inserted only if one or more of the secret trustees is a professional person. It does not seem possible, even if the secret trustees are the executors and trustees of the will, to authorise the payment out of the estate of the testator of such charges, because any provision of that kind would amount to a testamentary disposition and would have to be incorporated in and take effect under the will. Trusts to take effect as testamentary provisions cannot, for the reasons mentioned in the first footnote (p. 1), be engrafted upon a will by a document not executed as a will. The trusts evidenced by this memorandum attach effectively to the fund which comes into the hands of the secret trustees under the gift contained in the will; but they attach by virtue of the bargain made *inter vivos* between the testator and the secret trustees *and not by virtue of the will.*

of —— to ——] (*d*) by my last will (hereafter made) or by any codicil or codicils thereto.

Dated this —— day of —— 19—

(*Signature of Testator and address.*)

We accept and agree to be bound by the terms of the above memorandum.

Dated this —— day of —— 19—

(*Signatures of Trustees and addresses.*)

Form 16.

Will of a Testator Providing for his Illegitimate Children and Their Mother and Making no Provision for Dependants Entitled to the Benefit of the Inheritance (Family Provision) Act, 1938, the Reasons for the Dispositions Being Explained by a Separate Writing (*a*).

I, A of *etc.* HEREBY REVOKE all testamentary dispositions heretofore made by me and DECLARE this to be my last will

Appointment of trustees.

1. I APPOINT B of *etc.* and C of *etc.* (hereinafter called "my Trustees") to be executors and trustees of this my will.

(*d*) The testator may wish to make a gift (*e.g.*, of some specific article or sum) to one or more of the individual trustees, and if so it will be desirable to make it clear in this way that such gift is not to be held on the secret trusts.

(*a*) This will and the following form of statement is suggested for consideration where a testator is not proposing to make provision for his wife and other dependants under the Inheritance (Family Provision) Act, 1938, but is giving his property to his illegitimate children and their mother. In *Re Joslin, Joslin* v. *Murch*, [1941] W. N. 38, Farwell, J., held that a testator who had illegitimate children was not only entitled but bound to consider the obligations he owed to them as well as the legal duty he owed to his wife and children. Where his estate was so small that it was not practical to make provision for his wife and illegitimate children he could prefer the illegitimate children if in all the circumstances he considered this right. Every case depends upon its own circumstances. Where, however, a testator has good reason for not providing for his family he should state this clearly in writing. The statement should be executed at the same time as the will. It must be both signed and dated: see s. 1 (7) of the Act.

2. I HEREBY DECLARE (*b*) that I am making no provision for my wife D and my daughter E for the reasons set out in the written statement signed by me and bearing even date with this my will.

Residue gift.

3. I DEVISE AND BEQUEATH all my real and personal estate not otherwise disposed of by this my will unto my Trustees upon trust to sell call in and convert the same into money at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my Trustees that an earlier sale would be beneficial) with power to postpone the sale calling in and conversion of the whole or any part or parts thereof for so long as they shall think proper without being responsible for loss and I DIRECT that the income of the premises remaining unsold shall be applied as if the same were income accruing from the investments hereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my will.

Trust for payment of debts.

4. MY Trustees shall out of the moneys to arise from the sale calling in and conversion of my real and personal estate and out of my ready moneys pay my funeral and testamentary expenses and debts and the legacies given by this my will or any codicil hereto.

Trust to invest.

5. MY Trustees shall at their discretion invest the residue of the said moneys in the names of my Trustees in or upon any of the investments authorised by law for the investment of trust funds with power to vary or transpose such investments for or into others of a nature hereby authorised.

Trust of residue.

6. MY Trustees shall stand possessed of the residue of the said moneys and the investments for the time being representing the same and of such part of my estate as shall for the time being remain unsold and unconverted (all of which

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(*b*) For an example of a statement under the Act see the next form. The reason of the testator for not providing for his family may be incorporated in his will, but this should not be done where the statement is long or family matters require to be disclosed which are best not made public.

premises are hereinafter referred to as the trust fund) upon the trusts following (that is to say).

(i) My Trustees shall pay the income of the trust fund to X of *etc.* during her life [until she marries] (*c*)

(ii) After the death or marriage of X my Trustees shall stand possessed of the capital and future income of the trust fund In Trust for all or such one or more exclusively of the others or other of Y and Z the children of X or their remoter issue at such age or time or respective ages or times if more than one in such shares and with such trusts for their respective benefit and such provisions for their respective advancement (either during the life of X or after her death) and maintenance and education at the discretion of my Trustees or any other person or persons as X shall from time to time by any deed or deeds revocable or irrevocable or by will or codicil without transgressing the rule against perpetuities appoint And in default of and subject to any such appointment In Trust for such of the said Y and Z as shall attain the age of twenty-one years or marry if more than one in equal shares

(iii) In the event of the trusts hereinbefore declared in favour of X Y and Z failing or determining I DIRECT my Trustees to stand possessed of the trust fund upon trust for my said daughter E absolutely.

7. [*Power for a professional trustee to charge*].

IN WITNESS *etc.*

Form 17.

Statement in Writing by a Testator Under Section 1 (7) of the Inheritance (Family Provision) Act, 1938, Explaining the Reasons for his Testamentary Dispositions (*a*).

I of *etc.* HEREBY DECLARE this is the statement referred to in my will bearing even date herewith

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(*c*) Any reference to "widowhood" should be avoided: see *Re Gale*, 57 T. L. R. 320.

(*a*) This form is an example of the kind of statement a testator can make under the power conferred by the Inheritance (Family Provisions) Act, 1938, s. 1 (7), explaining his reasons for not making provision for a dependant under the Act. This form is intended to be used with the preceding form of will.

I have made no provision for my wife D and my daughter E for the following reasons:—

First I have carefully considered the amount of my wife's own income and I am satisfied that although it is small it is sufficient to maintain her My daughter is now of full age and in good health I have in the past spent considerable sums on her education and she is now in a position to support herself and if need be to contribute to the support of her mother

Secondly the property which I have to leave is so small that I am satisfied if it was divided any sum I gave to my wife and daughter would not be sufficient to assist them materially

Thirdly as my wife is aware I have been living for some years with X and have had two children namely Y and Z by her X is without any property of her own whatsoever Having regard to the fact that Y and Z are young children five and six years of age respectively it is not possible for X to earn her own living and at the same time properly to look after her children

In these circumstances having carefully considered the duty that I owe to my wife and daughter and the obligation I am under to provide for Y and Z who are my children and for X their mother I have come to the conclusion that the little property I have should be wholly devoted to making some provision for X and her children My property is insufficient to provide adequate maintenance both for my wife and second family and in these circumstances I feel my young children have the first claim upon me.

Signed this —— day of ——.

Form 18.

Conveyance of Land Settled Prior to 1926 to which a Person has Subsequently become Entitled to the Legal Estate, no Vesting Deed having been Previously Executed: Recital of Facts Constituting a Vesting Deed (*a*).

Drafted by Malcolm M. Lewis, Barrister-at-Law.

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Grantor") of the one part and B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the other part.

WHEREAS:

Recitals: of will of testator;

(1) T late of *etc.* (hereinafter called "the Testator") by his will dated the —— day of —— 19— appointed the Trustees to be the executors thereof and after making certain specific and pecuniary bequests devised and bequeathed the residue of his estate both real and personal to his wife the Grantor during her widowhood and upon her death or remarriage whichever should happen first then to his children in equal shares absolutely but the said will did not appoint any trustees or trustee for the purposes of the Settled Land Acts 1882 to 1890 and did not contain any provisions which under section 30 (1) of the

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(*a*) Stamp *ad valorem*. This precedent deals with two separate considerations. First, the need for a declaration by deed in order to exercise any powers under the Settled Land Act by a person in whom the legal estate was vested by the transitional provisions, and secondly a conveyance to give effect to persons becoming entitled to the legal estate under s. 36 of that Act.

Where no vesting deed has been executed prior to a dealing by the person in whom the legal estate has vested by the transitional provisions it does not appear to be necessary to execute a declaration by deed setting out the facts. It is sufficient if these facts are contained in a statement: S. L. A. s. 5 (1): and this statement appears by way of recital in a deed: *ibid.*

In such a case the settlement is on the title and a purchaser is concerned to see it: S. L. A. s. 110. Consequently where persons become entitled to the property in undivided shares the trustees of the settlement should call upon the estate owner to convey the legal estate to them to be held on the statutory trusts for sale: S. L. A. s. 36. It is doubtful whether the estate owner could make a good title in such circumstances after he has ceased to be entitled to have the powers of a tenant for life.

Settled Land Act 1925 would constitute trustees for the purposes of that Act (*b*).

(2) The Testator died on the —— day of —— 19— without having revoked or altered his said will which was duly proved in the —— Probate Registry on the —— day of —— 1924 by the Trustees. of his death and probate;

(3) The Testator left him surviving his wife the Grantor and two children.

(4) The Testator was at the date of his death seised in fee simple of the property hereinafter described and assured. of his seisin;

(5) The Grantor intermarried with —— on the —— day of —— 19—. of marriage;

(6) It is hereby declared that— declaration of vesting in grantor and as to trustees.

(a) the said property hereinafter described and assured is now vested in the Grantor in fee simple upon the trusts of the settlement created by the said will of the Testator

(b) the Trustees are the trustees of the settlement for the purposes of the Settled Land Act 1925

(c) the statutory power of appointing new trustees is applicable hereto.

(7) Pursuant to section 36 of the Settled Land Act 1925 the Trustees have requested the Grantor to assure the said property to the Trustees in manner hereinafter appearing.

Now in pursuance of the said request and for giving effect to the requirements of the Settled Land Act 1925 THIS DEED WITNESSETH as follows:—

1. THE GRANTOR as Trustee hereby conveys unto the Trustees ALL THAT *etc.* TO HOLD unto the Trustees in fee simple upon the statutory trusts for sale and otherwise in section 36 of the Settled Land Act 1925 mentioned or referred to and to hold the net proceeds of sale and the rents and profits until sale upon such trusts and subject to such powers and provisions as may be requisite for giving effect to the rights of the persons interested in the premises. Conveyance upon trust for sale.

(*b*) In the absence of any trustees appointed by the will, the personal representatives are the trustees for the purposes of the Settled Land Act: see s. 30 (3).

2. The statutory power of appointing a new trustee or new trustees hereof is applicable hereto.

In witness *etc.*

Form 19.

Covenant in Consideration of Marriage by the Wife to Pay the Income Tax and Surtax Payable in Respect of her Own Income (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

To —— of ——.

In consideration of our intended marriage and pursuant to arrangements in this behalf made upon the treaty for such marriage I —— of —— spinster hereby covenant with you that I my executors or administrators will at all times duly pay all income tax surtax and other taxes that may at any time or times hereafter become payable (under the law of England or of any other country or place) by you or me or both of us in respect of my income or any part thereof and will at all times keep you your executors administrators estate and effects effectually indemnified from and against all actions proceedings costs damages claims and demands in respect of such taxes respectively or any of them.

In witness, etc.

(*a*) Where a married woman is living with her husband her profits are deemed to be the profits of her husband and are assessed in his name and not in her name: Income Tax Act, 1918, General Rules, r. 16. The tax is calculated on the joint income. The husband is liable to pay his wife's income tax and surtax and he has no claim against her estate to be recouped tax paid in respect of her income: *Re Ward*, [1922] 1 Ch. 517 at 520. The husband or wife may apply to the Commissioners of Inland Revenue to be separately assessed (General Rules, r. 17), but a separate assessment does not generally make the parties liable to pay less tax or relieve the husband of his liability. This form is intended to place upon the wife the liability to pay her own income tax, and to relieve the husband of the burden which in many cases he cannot afford to bear. In the event of the husband being in fact called upon to pay, this document gives to him a right of indemnity as against his wife.

Form 20.

Assignment of the Benefit of a Continuing Arrangement and of the Money Deposited with a Building Society Thereunder Subject to the Rights of the Society Therein (*a*).

Parties.

THIS ASSIGNMENT is made the —— day of —— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the one part and B of *etc.* (hereinafter called "the Purchaser") of the other part

Recitals: Continuing arrangement;

WHEREAS by a continuing arrangement (hereinafter called "the continuing arrangement") made the —— day of —— between the Vendor of the one part and the X Building Society of the other part the Vendor agreed to deposit with the X Society the sums of money therein specified before the execution of any mortgage by a customer of the Vendor in favour of the Society and it was thereby provided that the Vendor might by notice in writing to the said Society terminate his liability thereunder to deposit any further moneys with the Society

Deposit of moneys;

AND WHEREAS pursuant to the provisions of the continuing arrangement the Vendor has from time to time deposited various sums with the said Society and the sums now held by the said Society amount to the aggregate sum of £*y*

Termination of continuing arrangement;

AND WHEREAS by a notice in writing to the said Society dated the —— day of —— made pursuant to the power in that behalf contained in the continuing arrangement the Vendor gave notice to the Society that he would not deposit any further moneys with the said Society

Agreement for sale.

AND WHEREAS the Vendor has agreed with the Purchaser for the sale and transfer to him for the sum of £*z* of the benefit of the continuing arrangement and the moneys so deposited with the Society as aforesaid subject to the charge of the Society on the said moneys to secure customers' mortgages as therein provided and to all rights of the Society and in consideration

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(*a*) Stamp *ad valorem*. This form is an assignment of the benefit of the pool agreement—see Form 4, *ante*, p. 347. Notice of this assignment must be given to the society: see s. 136 of the Law of Property Act, 1925.

of the Purchaser undertaking all the liabilities of the Vendor thereunder (*b*)

AND WHEREAS it has been also agreed that the assignment for carrying out the said sale shall contain the covenants and provisions hereinafter contained

NOW THIS DEED WITNESSETH in pursuance of the said Agreement as follows:—

Assignment. 1. IN consideration of the sum of £*z* now paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) the Vendor as beneficial owner hereby assigns unto the Purchaser ALL the moneys now standing to the credit of the Vendor with the said Society under the continuing arrangement and all interest due or to accrue due thereon TOGETHER with the benefit of the continuing arrangement TO HOLD the same unto the Purchaser absolutely subject to the charge of the said Society and to all the rights and interests of the said Society under the continuing arrangement.

Covenant by the Purchaser. 2. THE Purchaser hereby covenants with the Vendor that the Purchaser will pay to the Society on such payment being lawfully demanded all moneys payable by the Vendor under the continuing arrangement and will at all times keep the Vendor effectually indemnified against the same and every part thereof and all actions proceedings claims and demands whatsoever in respect thereof.

IN WITNESS *etc.*

(*b*) This assignment might be made free from all liability to fulfil the vendor's obligations under the continuing arrangement. In this case, the vendor would have to enter into appropriate covenants to pay all sums due to the society in case of any mortgagor's failure to pay and the provisions of the continuing arrangement in case of such default coming into operation.

Form 21.

Agreement by a Company in Liquidation and its Sureties for the Assignment of the Benefit of a Building Contract with a Local Authority (Subject to the Obligations Thereby Imposed) to a New Company (*a*).

THIS DEED is made the —— day of —— 19— BETWEEN A Limited in liquidation whose registered office is situate at *etc.* (hereinafter called "the Assignor") of the first part B of *etc.* (hereinafter called "the Liquidator") of the second part C of *etc.* and D of *etc.* (hereinafter called "the Sureties") of the third part and E Limited whose registered office is situate at *etc.* (hereinafter called "the Assignee") of the fourth part Parties.

WHEREAS:

(1) By a contract in writing (hereinafter referred to as "the Contract") dated the —— day of —— 19— and made between the mayor aldermen and burgesses of the borough of X (hereinafter called "the Corporation") of the one part and the Assignor of the other part the Assignor agreed for the consideration therein mentioned (hereinafter referred to as "the Contract price") to execute complete and maintain the building and other works at —— in the county of —— therein more particularly described Recitals:

(2) By a deed poll bearing even date with the contract the Sureties were held and firmly bound to the Corporation in the sum of £—— for the due performance of the contract as therein mentioned

(3) At a general meeting of the Assignor held on the —— day of —— the Assignor passed a special resolution that the Assignor should be wound up voluntarily and at a meeting held on the —— day of —— of the creditors of the Assignor the Liquidator was duly nominated liquidator of the Assignor for the purposes of such winding up

(4) The Liquidator in the name and on behalf of the Assignor with the consent of the Sureties and in consideration

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(*a*) Stamp 10s.

of the covenants hereinafter contained has agreed to assign to the Assignee the benefit of the contract subject to all obligations and liabilities thereunder and the Assignee has agreed in consideration of the sum of £—— to take an assignment of the benefit of the contract subject to the said obligations and liabilities in manner hereinafter appearing

Now this deed witnesseth and it is hereby agreed and declared as follows:—

1. The Assignor acting by the Liquidator will assign unto the Assignee the interest obligations and liabilities of the Assignor by a deed (hereinafter called "the assignment") which is now in course of preparation.

2. The Liquidator and the Sureties or some or one of them shall immediately before the execution of the assignment pay to the Assignee the sum of £——.

3. On payment of such sum of £—— to the Assignee the Assignee hereby covenants that it will if so required by the Liquidator or the Sureties or any one of them by Deed to be prepared by the Assignee's solicitors but at the cost of the Liquidator and the Sureties procure the release of the Assignor acting by the Liquidator and the Sureties from all claims and demands whatsoever which may hereafter arise under the Contract or the said Deed Poll or otherwise.

In witness *etc.*

Form 22.

Further Charge by Borrower in Favour of First Mortgagees, Advancing Money for Repair of Premises Suffering War Damage, Second Mortgagee Agreeing to Postponement of Security; Additional Charge on Compensation Moneys (*a*) (*b*).

Drafted by T. J. Sophian, of the Inner Temple.

THIS FURTHER CHARGE is made the —— day of —— 19— BETWEEN A B of *etc.* C D of *etc.* (hereinafter called "the Borrowers" which expression where the context so admits includes the persons deriving title under them) of the one part X Y of *etc.* (hereinafter called "the Second Mortgagee" which expression where the context so admits includes the persons deriving title under him) of the second part and T. W. & Co. Ltd. whose registered office is situate at —— (hereinafter called "the First Mortgagees" which expression where the context

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(*a*) This form is appropriate to a second mortgage made after 1925.

(*b*) This further charge is one made by the borrower in favour of a first mortgagee, who is advancing a sum of money towards the expense of making good war damage suffered by the property. In addition to the charge on the property itself a charge is also given on such compensation moneys as may at some time be recoverable under the present or any other future compensation scheme in respect of war damage.

Under the Landlord and Tenant (War Damage) Act, 1939, the mortgagor cannot be compelled to make good war damage: s. 1 (1), (3). Where war damage is suffered, the mortgagor must serve notice on the mortgagee pursuant to s. 2 (1) (a) and must allow the mortgagee to enter and inspect the damaged property and execute any repairs he may be desirous of effecting: s. 2 (1) (b). Default in service of the notice is not, however, a ground for the mortgagee enforcing any right or remedy arising out of such breach and leave of the Court is necessary: s. 2 (2).

In this form the first mortgagee is secured in three ways: firstly, by taking a further charge on the property; secondly, by taking an "assignment" of the "spes" in regard to compensation; and thirdly, by the postponement of the second mortgagee's security. His position is further fortified by agreements to assign any insurance policies against war damage which the borrower may be compelled to take out under the insurance scheme or which may be otherwise made available to him, together with the full benefit of any such policy. Lastly, there is a covenant for further assurance on the part of the borrower.

so admits includes the persons deriving title under them) of the third part:

Recitals:

WHEREAS

First mortgage;

(1) This deed is supplemental to a mortgage (hereinafter called "the principal deed") dated the —— day of —— and made between the Borrowers of the one part and the First Mortgagees of the other part being a mortgage of certain freehold property at —— to secure the repayment to the First Mortgagees of the sum of £—— and interest thereon at the rate of £—— per cent. per annum

Second mortgage;

(2) This deed is also supplemental to a legal charge (hereinafter called "the second mortgage" dated the —— day of —— and made between the Borrowers of the one part and the Second Mortgagee of the other part whereby the Borrowers charged by way of legal mortgage the said property for securing the payment to the Second Mortgagee of the principal sum of £—— [on a day now passed] with interest thereon at the rate of £—— per cent. per annum but subject to the principal deed and to the principal money and interest thereby secured

Registration of land charge by second mortgagee;

(3) On the —— day of —— 19— the Second Mortgagee registered a land charge in respect of the second mortgage.

Principal under principal deed still unpaid;

(4) The said sum of £—— is still owing upon the security of the principal deed but all interest accrued thereon up to the date of this deed has been paid

War damage to property: notice thereof;

(5) On the —— day of —— 19— the said property suffered war damage notice of which was on the —— day of —— 19— served by the Borrowers on the First Mortgagees pursuant to section 2 (1) (a) of the Landlord and Tenant (War Damage) Act 1939

Claim in respect of war damage;

(6) On the —— day of —— 19— the Borrowers submitted a claim in respect of the said war damage suffered by the said property to the local office of the District Valuer Inland Revenue at [—— in the county of ——]

Right of borrowers to compensation for war damage;

(7) The Borrowers are or may or will be in law entitled to or may or will receive by way of voluntary payment compensation in respect of the said war damage to the said property under the existing Government compensation scheme and/or under such

substituted or additional compensation or war damage or war risks insurance scheme that may be subsequently introduced by the Government or otherwise or be otherwise available to the Borrowers

(8) The Borrowers have not received at the date of this deed any such compensation in respect of the said war damage to the said property — Non-receipt of compensation;

(9) The Borrowers are desirous of making good the said war damage — Desire to make good war damage;

(10) The First Mortgagees have agreed to advance to the Borrowers the sum of £—— for the purpose of making good the said war damage upon having the repayment thereof with interest as hereinafter mentioned secured in manner hereinafter appearing — Agreement by first mortgagees to advance money for such purpose;

(11) The Second Mortgagee has at the request of the Borrowers agreed to join in this deed for the purpose of postponing the second mortgage to the security hereby made — Agreement by second mortgagee to postponement of security.

NOW IN PURSUANCE of the said agreement and in consideration of the sum of £—— now paid by the First Mortgagees to the Borrowers (the receipt of which sum the Borrowers hereby acknowledge) THIS DEED WITNESSETH as follows:—

1. THE BORROWERS hereby covenant with the First Mortgagees to pay them on the —— day of —— 19— the sum of £—— with interest thereon from the date hereof at such a rate as after deducting income tax therefrom at the standard rate of tax from time to time in force will amount to interest at the net rate of £—— per cent. per annum free of tax. — Covenant to pay principal and interest.

2. And also so long as any principal money remains due hereunder or under any order for payment or judgment obtained hereunder after the day hereinbefore fixed for payment of the same to pay to the First Mortgagees interest thereon at the rate aforesaid on the —— day of —— and the —— day of —— in every year. — Covenant to pay interest while principal remains due or under any order or judgment.

3. WITHOUT PREJUDICE to the rights and remedies of the Second Mortgagee against the Borrowers the Second Mortgagee at the request of the Borrowers and as mortgagee hereby agrees — Postponement of second mortgage.

that the property comprised in the principal deed shall stand charged with the payment of the two sums of £—— and £—— and the interest thereon thereby and by this deed respectively secured in priority to the principal sum of £—— and the interest thereon secured by the second mortgage and in like manner as if the principal deed had been originally executed for securing the aggregate of the said two sums of £—— and £—— and the said interest.

Further charge.

4. The Borrowers as beneficial owners hereby

(i) Charge by way of legal mortgage the property comprised in the principal deed with the payment of all principal money interest and other money payable by the Borrowers under this deed subject to but in addition to the said principal sum of £—— owing on the security of the principal deed and the interest due or to become due thereunder

Tacking.

(ii) Declare that the property comprised in the principal deed shall be discharged from all right of redemption under the principal deed and shall be redeemable only on payment by the Borrowers to the First Mortgagees of all principal money interest and other money payable by the Borrowers under the principal deed or this deed

Assignment: of compensation moneys;

(iii) Assign unto the First Mortgagees all compensation moneys which the Borrowers or any person deriving title under them are or may or will be entitled to in law or may or will receive by way of voluntary payment in respect of the said or any further war damage to the said property under the existing Government compensation scheme and/or under any substituted or additional compensation or war damage or war risks insurance scheme that may be subsequently introduced by the Government or otherwise or may become available to the Borrowers together

Insurance policies.

with all moneys payable under any policy or policies insuring the said property against the said or any further war damage which the Borrowers may be required or may be enabled to take out under any such scheme or otherwise together with the said policy or policies and the full benefits thereof

Proviso for redemption.

To hold the same unto the First Mortgagees subject to the like right of redemption as immediately after the execution of

this deed will under the principal deed and this deed be subsisting with respect to the property comprised in the principal deed

Covenants, etc., of principal deed to apply.

5. ALL THE covenants and provisions in the principal deed shall apply for enforcing payment of all principal money interest and other money payable by the Borrowers under this deed in like manner as they apply for enforcing payment of principal money interest or other money payable by the Borrowers under the principal deed.

Powers under L. P. Act, 1925, to extend to principal deed.

[6. THE POWERS conferred by the Law of Property Act 1925 on mortgagors and mortgagees respectively in regard to mortgages made after the commencement of that Act shall extend and apply to the principal deed as if that deed had been executed after the commencement of that Act.]

Powers conferred on first mortgagees by second mortgagee with regard to cancellation of land charge.

7. THE SECOND MORTGAGEE hereby irrevocably appoints the First Mortgagees and their substitutes or substitute severally and jointly to be his attorneys or attorney in his name or otherwise to consent to the cancellation of the recited land charge in any of the following events namely: If the First Mortgagees

(i) Sell under their statutory powers of sale as respects the land so sold

(ii) Acquire the fee simple in the land comprised in the principal deed or any part thereof by foreclosure as respects the land so acquired

(iii) Acquire the fee simple in the land comprised in the principal deed or any part thereof under the Limitation Act or otherwise free from any right of redemption as respects the land so acquired

Right of first mortgagees to production of second mortgage and delivery of copies.

8. THE SECOND MORTGAGEE hereby acknowledges the right of the First Mortgagees to production of the second mortgage and to delivery of copies thereof.

Further covenants by borrowers: To submit specifications, plans and estimates in advance;

9. THE BORROWERS hereby further covenant:—

(a) To submit in advance within [*period*] of the date of this deed to and for the approval of the First Mortgagees detailed specifications plans and estimates and such further specifications plans and estimates as the First Mortgagees may reasonably require in relation to the repairs and other work that may be

necessary to make good the said war damage suffered by the said property

To make good war damage in accordance with approved specifications, etc., to approval of surveyor of first mortgagees;

(b) To execute the said repairs and other work in a proper and workmanlike manner in accordance with the approved specifications plans and estimates to the approval of the surveyor of the First Mortgagees within —— [period] of the date on which notice in writing of such approval as first mentioned is given to the Borrowers by the First Mortgagees

To apply money advanced towards execution of repairs;

(c) To apply the money advanced hereunder in and toward the execution of the said repairs and other work [and to repay any balance forthwith wholly to the First Mortgagees]

To pay costs and expenses of first mortgagees with regard to approval of specifications, etc., and approval of work;

(d) To pay the reasonable costs and expenses incurred by the First Mortgagees in connection with the approval of such specifications plans and estimates and of the execution of the said repairs and other work and such costs and expenses while the same remain unpaid shall be a charge on all the property hereby mortgaged

To insure property against war damage to fullest extent;

(e) To insure and keep insured the said property against war damage including the said war damage already suffered to the fullest extent to which such insurance may be compulsorily required or may be rendered available to the Borrowers under any Government scheme or schemes and/or any other scheme or schemes of insurance against war damage or war risks as the Mortgagees may from time to time require

To produce insurance policies;

(f) To produce and deliver to the First Mortgagees such policy or policies of insurance upon the same being taken out

To pay premiums punctually;

(g) Punctually to pay every sum from time to time payable for keeping on foot every such insurance and to deliver whenever required the receipt for every such sum to the First Mortgagees

In event of default to do all acts to enable first mortgagees to insure.

(h) In case of default by the Borrowers in insuring and keeping insured the said property in manner aforesaid to do all that may be necessary to enable the First Mortgagees to insure and keep insured the said property in the manner aforesaid and to repay to the First Mortgagees every sum expended by them on such insurance with interest thereon at the rate aforesaid and every sum so expended by the First Mortgagees

and the interest thereon shall be a charge on all the property hereby mortgaged

Covenant for further assurance.

10. The Borrowers further covenant that they and every person deriving title under them and every other person having or rightfully claiming any estate or interest in any of the property hereby mortgaged including any such compensation money any such policy and any moneys payable thereunder or any part thereof will from time to time and at all times on the request of the First Mortgagees or of any person deriving title under them (but so long as any right of redemption exists under this security at the cost of the Borrowers or of those deriving title under them and afterwards at the cost of the person making the request) execute and do all such lawful assurances and things for further or more perfectly assuring the said property and every part thereof to the First Mortgagees and to those deriving title under them as by him or them or any of them shall be reasonably required.

In witness *etc.*

Form 23.

Deed Confirming the Execution and Contents of a Deed of Mortgage which, together with all Drafts, Instructions, etc., has been Destroyed by Enemy Action (*a*).

Settled by Hubert A. Rose, of the Inner Temple.

THIS DEED OF CONFIRMATION made the —— day of —— 19— BETWEEN —— of *etc.* (hereinafter called "the Borrower") of the one part and —— of *etc.* (hereinafter called "the Mortgagee") of the other part

Recitals:

WHEREAS:

Mortgage;

1. BY a mortgage by deed dated in or about the month of —— in the year —— and made between the Borrower of the one part and the Mortgagee of the other part certain freehold [*or* leasehold] property shortly described in the First Schedule hereto was duly mortgaged by the Borrower to the Mortgagee for securing a principal sum of £— with interest thereon at the rate of £— per cent. payable [quarterly] on the —— day of —— the —— day of —— the —— day of —— and the —— day of —— in every year.

Stamping and execution;

2. THE said mortgage was duly stamped and was signed sealed and delivered by the Borrower in the presence of a witness or witnesses who duly attested the execution thereof.

Custody of deed;

3. PREVIOUSLY to the destruction thereof on the date and in the manner next hereinafter mentioned the said mortgage and the title deeds relating to the property comprised therein had been deposited with Messrs. X & Co. the solicitors of the Mortgagee [the Mortgagee and the Borrower] and were at such date in the custody of such solicitors at their offices No. —— —— Street ——.

Destruction of deed;

4. ON the —— day of —— explosive and incendiary bombs were dropped on the said offices by the King's enemies by reason whereof the said offices were demolished and all the

(*a*) Stamp 10s.

contents thereof (including the said mortgage and relative title deeds and any drafts abstracts or copies thereof in the possession of the said solicitors) were wholly consumed by fire.

State of mortgage debt;

5. The whole of the said principal sum of £—— is still owing to the Mortgagee on the security of the said mortgage with the sum of £—— for interest thereon for the quarter ending the —— day of —— 19— [*or* but all interest thereon has been paid up to and including the interest for the quarter ending the —— day of —— 19— [*or*, The principal sum of £—— only part of the said principal sum of £—— remains owing to the Mortgagee on the security of the said mortgage with the sum of £—— for interest *etc.*].

Destruction of drafts;

6. So far as the Borrower is aware no copy or draft or abstract of the said mortgage or the relative title deeds is in his possession [*or*, in that of his solicitors Messrs. ——].

7. In the circumstances aforesaid it is impracticable to annex hereto a copy of the said mortgage or to set out the exact contents thereof in a Schedule hereto but the Borrower and the Mortgagee are respectively satisfied that the said mortgage contained provisions and covenants the nature and effect of which are stated or epitomised in the Second Schedule hereto.

Agreement to admit validity of mortgage.

8. In consequence of the destruction of the said mortgage and relative title deeds in manner aforesaid the Mortgagee has requested the Borrower to acknowledge and admit and the Borrower has agreed to acknowledge and admit the due execution and validity of the said mortgage and (subject to the proviso lastly hereinafter contained) the accuracy of the statement contained in the Second Schedule hereto.

Operative provisions.

Now this deed witnesseth that in pursuance of the said agreement the Borrower for himself and his personal representatives hereby admits and acknowledges First that the said mortgage was duly executed by the Mortgagee in the presence of and attested by a credible witness or witnesses Secondly that the property described in the First Schedule hereto was comprised in the mortgage and constituted the security for the aforesaid principal sum advanced to the Borrower by the Mortgagee and the interest thereon Thirdly that the said

mortgage contained the provisions and covenants the nature and effect of which are stated or epitomised in the Second Schedule hereto and FOURTHLY (but subject to the proviso next hereinafter contained) that this deed shall be admitted and taken as full and complete evidence of the said mortgage and may be acted upon and all remedies pursued with regard thereto in like manner and as effectively as if the originals of the said mortgage and the relative title deeds had not been destroyed as aforesaid PROVIDED ALWAYS that the execution of the deed by the parties hereto shall not operate to estop or preclude either the Mortgagee or the Borrower or their respective personal representatives from producing and relying upon such (if any) secondary evidence of the contents of the said mortgage or relative title deeds as may hereafter be discovered by or otherwise come to the hands of the Mortgagee or the Borrower or their respective personal representatives.

IN WITNESS *etc.*

THE FIRST SCHEDULE ABOVE REFERRED TO.

[*Description of the mortgaged property; if leasehold, say:* "which premises were by a lease dated *etc.* and made *etc.* demised for a term of —— years from —— at the yearly rent of £——".]

THE SECOND SCHEDULE ABOVE REFERRED TO.

1. The said mortgage contained:—

(i) A covenant by the Borrower with the Mortgagee to pay the said principal sum of £—— to the Mortgagee on a day [long] since past with interest thereon at the rate stated in the first recital hereof and in default to pay interest at the said rate on the quarterly days mentioned in the first recital.

(ii) A demise of the property described in the First Schedule hereto for a term of years absolute of or

exceeding 1,000 years from the date of the mortgage [a charge of the property described in the First Schedule hereto by way of legal mortgage].

(iii) A provision for the reduction of the rate of interest from £— to £— per cent. if the power of sale had not become exercisable and if payment was made within fourteen days of any such quarterly date.

(iv) A covenant by the Borrower with the Mortgagee to keep the said property in good and substantial repair and to insure the same against loss or damage by fire to the full value thereof [in the sum of £——] in the —— Insurance Office or in some other insurance office to be approved by the Mortgagee and to pay and produce to the Mortgagee the premiums on such policy. [*If leasehold it may be necessary to substitute:* A covenant by the Borrower with the Mortgagee to keep the said property in such a state of insurance and repair as is required by the covenants of the said lease.]

(v) A charge of Mortgagee's expenses in the usual form.

2. The said mortgage did not contain any provision extending excluding or varying either

(i) The power of sale and other powers given to a mortgagee by statute

(ii) The power of leasing given to a mortgagor by statute or

(iii) The statutory restrictions upon the consolidation of mortgages.

[2. *Or*, The said mortgage contained the following provisions extending excluding or varying the powers given by statute to a mortgagee and mortgagor respectively, namely:—

(i) The statutory power of sale of the Mortgagee was extended or varied as follows: [*state how*].

(ii) The statutory power of leasing of the Mortgagor was restricted as follows: [*state how*].

(iii) The statutory restriction upon the consolidation of mortgages was excluded.]

Form 24.

Directions for the Payment of Annuities Given by Will and for the Appropriation of a Fund to Answer Them (*a*).

Drafted by A. H. Withers, of Lincoln's Inn.

1. [Except as otherwise provided] every annuity shall commence as from my death and be paid free of death duties (*b*) [and income tax (*c*) (but not surtax) (*d*)] [and of

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(*a*) This form is an attempt to standardise the provisions which should be inserted in a will where one or more annuities are given. Annuities are a very popular means of providing for a beneficiary. Owing, however, to the tendency to-day for income and income tax to fluctuate within very wide limits it is advisable for the testator to give specific directions as to how the annuity is to be paid and secured, in order to enable the residue of the estate to be dealt with and distributed. The statutory power of appropriation conferred by the Administration of Estates Act, 1925, s. 41, extends to annuities. Sub-s. (9) authorises the setting apart of a fund to answer an annuity by means of the income of that fund or otherwise. If no directions are given and the statutory power is relied upon the personal representatives will have to follow the Court rule of selecting the Government security which is most permanent and least likely to be redeemed: *Re Hollins*, [1918] 1 Ch. 503, 513.

(*b*) Unless an annuity is expressly given free from death duties it is subject to legacy or succession duty according as to whether it is payable out of personal or real estate: see Customs, etc. Act, 1888, s. 21 (2). To the extent that the annuity is payable out of real estate, it must be treated as real estate for the purpose of estate duty and must also bear the proportionate part of the estate duty attributable to it: *Re Spencer Cooper*, [1908] 1 Ch. 130; *Re Owers*, [1941] Ch. 17.

(*c*) A direction in a will to pay an annuity free of income tax is good: *Re Buckle*, [1894] 1 Ch. 286. Owing, however, to the increasingly high rate of income tax it is very doubtful whether it is any longer advisable to give annuities free of income tax. If they are given free of tax and a fund is set aside to answer them, and there is power to resort to capital should the rate rise after the fund is set aside, the whole fund may be exhausted. Where an annuity is given free of tax a question arises as to the reliefs which the annuitant is entitled to under the Income Tax Acts. If no express provision is inserted with regard to such reliefs, the trustees of the will can insist on the annuitant signing the requisite form for obtaining the reliefs: *Re Kingcome*, [1936] 1 Ch. 566. When the relief has been obtained, the annuitant will only be entitled to retain such proportion of the sum repaid as is attributable to his income other than the annuity: *Re Pettit*, [1922] 2 Ch. 765. With income tax at a high rate the sum obtained in repayment may be relatively substantial. The claim for repayment is frequently a source of dispute between the trustees

the Bank's income fee (*e*)] by equal quarterly payments on the four usual quarter days in every year and the first of such quarterly payments (being proportionate to the period elapsed since the commencement of such annuity) shall be made on the first quarter day occurring after the commencement of such annuity [and further each annuity shall for the purposes of the provisions hereinafter contained be deemed to include the income tax and income fee free of which it is given].

2. [Subject as hereinafter provided (*f*)] Form No. 5 (*g*)

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and the annuitant and it may be advisable to allow the annuitant to retain all reliefs. Where this is the intention the following provision should be inserted after the words "but not surtax": "and so that the annuitant shall enjoy all benefit of abatement or relief from tax in respect of the said annuity".

(*d*) A gift free of income tax is also free of surtax: *Re Hulton*, [1931] 1 Ch. 77. It is therefore essential, if an annuity is given free of income tax, that it should be expressed to be not free of surtax, as otherwise, if the annuitant acquires a large income from other sources, the surtax payable in respect of the annuity may rise to such a figure as to exhaust in a comparatively short period any fund set aside to answer the annuity.

(*e*) In the absence of any direction to the contrary, where a trust corporation is trustee the corporation's income fee is payable out of the income of the fund set aside to produce the annuity: *Re Godwin*, [1938] Ch. 341; *Re Roberts' Will Trusts*, [1937] 1 Ch. 274.

(*f*) These words will not be required if clause 3 is not inserted.

(*g*) Form No. 5 provides as follows:—

"The following provisions shall have effect in regard to any annuities or annuity given by my will—

"(1) The trustees may, and (if so requested by or on behalf of any person beneficially interested in the property affected), shall, as soon as may be after any annuity commences to accrue, set apart in their names or under their control authorised investments to provide a fund the income whereof will be sufficient, in the opinion of the trustees, to produce an annual sum equal to the amount of the annuities for the time being payable under my will.

"(2) The income or, if necessary, the capital of the fund so appropriated, shall be applied in payment of every subsisting annuity.

"(3) Until a fund shall be so appropriated, my residuary estate shall stand charged with the payment of every subsisting annuity, but, after appropriation, the said estate shall be thereby discharged therefrom.

"(4) The appropriated fund, or, where more than one annuity is bequeathed, such parts thereof as, in the opinion of the trustees, may not be required to answer any subsisting annuity, shall, on the cesser of an annuity, fall into my residuary personal estate.

"(5) Accordingly, as each annuity ceases, the trustees may treat as part of my residuary personal estate, the whole or a corresponding part of

(directions respecting annuities) contained in Part I of the Statutory Will Forms 1925 is incorporated in this my Will and applies separately to each annuity [and any fund appropriated to answer an annuity given free of income tax shall be appropriated on the footing that the rate of income tax (*h*) in force when the appropriation is completed will never change].

3. (*i*) [If the income for any year of any fund appropriated to answer any annuity shall be insufficient to pay in full the annuity payable thereout for such year the deficiency for such year shall not be made good out of capital or out of the income for any subsequent year or years [period after the cesser of the annuity] and the surplus income of any such fund for any year [during the subsistence of the annuity shall be applied in or towards payment of any arrears of the annuity but] shall not be held up to answer any possible deficiency of income in any subsequent year or years and when (at the completion of the appropriation or the end of the annuity) the annuity is payable for part only of a year this provision (3) shall apply as if such part of a year were a whole year and the annuity were such proportion of the said annuity as such part bears to a whole year.]

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the appropriated fund, as the case may require, retaining only such part thereof (if any) as may, from time to time, in their opinion, be sufficient to produce, by the income thereof, an annual sum equal to the amount of any subsisting annuities.

"(6) Any surplus income of the appropriated fund shall be applied in the same manner as the income of my residuary personal estate.

"(7) The trustees may, at their discretion, vary any of the investments for the time being representing the appropriated fund for other authorised investments.

"(8) In this clause 'annuity' includes any periodical payment (not being a rentcharge) for life or other terminable interest."

Clause 3 (iv) of the Statutory Will Forms defines "authorised investments" as meaning "investments authorised by the will creating the trust, for the investment of any money subject to the trusts of the will, or by law".

(*h*) This meets the difficulty of the varying rate of tax: see *Re Twiss*, [1940] W. N. 380.

(*i*) This clause should not be inserted if the intention is that there shall be a power to resort to capital under clause 2 of Form 5 of the Statutory Will Forms.

INDEX

TO THE CONVEYANCER, VOLUMES 4 AND 5.

ACCUMULATION,
direction to trustees as to, *4*, **485**

ACQUISITION
of land for defence, compensation for, *4*, 54—60; *5*, 299

ADMINISTRATION,
action, costs of, executor's right of retainer, *4*, 101
annuities and pecuniary legacies, insufficient assets, *4*, 97, 98; *5*, 148
free of tax, estate insufficient, date of valuation, *5*, 308
application of assets, intention to displace statutory order, *5*, 71, 225
apportionment, settled residuary gift and annuity, rule in *Allhusen* v. *Whittell*, *4*, 99
donatio mortis causa, delivery of chattels and bank deposit book, *4*, 100
executor's right of retainer includes costs of administration action, *4*, 101
future contingent liability, distribution, *5*, 70
hotchpot clause, date for valuation for, *4*, 101
intestacy, real estate in Australia, *5*, 310
judgment by default against executors, rebuttable presumption of *devastavit*, *4*, 102
policy on life of child, whether trust, *5*, 309
valuation of residue, appropriate date for, *5*, 149

ADMINISTRATION OF ESTATES ACT, 1925,
assent under section 36, purchaser's right to written, *4*, 375, 376

ADMINISTRATORS,
appropriation and assent by, *4*, **491**
assent by, to widow of intestate, *4*, **491**

ADVANCEMENT,
trustees' power of, to object of discretionary trust, *4*, 322

ADVERTISEMENT,
intended change of name to comply with Defence (General) Regulations, *5*, **354**

AGENT
and principal, undue influence between, *4*, 281, 282

AGREEMENT
between landlord and tenant for repair of war damage, *5*, **364**, **367**
partners to regulate affairs during war, *4*, **467**
for sale of freeholds, payment by instalments, *5*, **337**
for supply of water to land of adjoining owner, *4*, **530**
" on hire-purchase terms ", validity of contract, *5*, 294
" subject to lease to be drawn up by our client's solicitors ", construction of, *4*, 83

[*Italic figures indicate volume number; black figures indicate Precedents.*]

AGRICULTURAL HOLDINGS ACTS,
notice to quit under, where tenant of two holdings receives notice as to one only, *4*, 94

AGRICULTURE,
control of cultivation, *5*, 28
Control Orders, *5*, 31
emergency regulations, index to, *5*, 96
insurance against war damage, *5*, 24
landlord and tenant, *5*, 25

AIR RAID PRECAUTIONS. *See also* CIVIL DEFENCE.
shelter, agreement to erect, *5*, **359**
licence to erect, *5*, 161, **370**

ALIENS,
Aliens Restrictions Act, *4*, 261
enemy, contracts with, *4*, 264, 265
Courts (Emergency Powers) Acts and, *5*, 20
who are, *4*, 262, 263
internment, effect on rights of, *4*, 263, 264
lease of, effect of war on, *4*, 140, 141
power of attorney, contract made under, *4*, 272
prisoner of war may sue, *4*, 266
Trading with the Enemy Act, 1939...*4*, 266—268

ALLHUSEN v. *WHITTELL*, RULE IN,
apportionment, settled residuary gift and annuity, *4*, 99
clause in will negativing rule, *4*, **521**

ANNUITY,
" clear of all deductions ", *4*, 338
" clear of all deductions for income tax but not surtax ", *4*, 105
consideration in drafting, *5*, 412
determinable on bankruptcy, effect of, *4*, 218
direction for payment and appropriation, *5*, **412**
to resort to capital, construction of, *4*, 97
to set aside fund, gift over, deficiency, *5*, 148
" free of all deductions ", *4*, 424
income tax, deficiency made up out of capital, *4*, 445
revocable covenants for payment of, *5*, 233
purchase of unexhausted balance, income tax, *5*, 231
release of covenant, temporary, owing to war, *4*, **519**
tax free, annuitant's reliefs and allowances, *4*, 336, 337; *5*, 412, 413
will, gift by, during war period, capital to vest after, *4*, **484**

APPORTIONMENT
of dividends of shares, option to purchase in will, *4*, 328
tenant for life and remainderman, valuation of investments appropriated, *4*, 332
unauthorised investments in settled residuary gift, *Howe* v. *Lord Dartmouth*, *4*, 439

APPROPRIATION,
assent, and, in favour of widow of intestate, *4*, **491**
objections to, *5*, 212, 287

ARBITRATION
clause, in agreement between partners, *4*, **469**
for repair of war damage, *5*, **366, 369**

ARTICLES OF PARTNERSHIP,
deed modifying, where one partner on war service, *4*, **469**

ASSENT
in favour of widow of intestate, *4*, **491**
note on, *5*, 213, 215, 287
under Administration of Estates Act, 1925, s. 36, implied or written, purchaser's right as to, *4*, 375—378

ASSIGNMENT
by company in liquidation of building contract, *5*, **355**
compulsory acquisition, whether included in, *4*, 143
continuing arrangement with building society, *5*, 347, **397**
donatio mortis causa, whether sufficient, *4*, 403—406
of book debts, by trustee under deed of arrangement, *4*, **544**
of leasehold premises, *5*, **372**
of right to compensation under War Damage Act, 1941...*5*, 260

BANKRUPTCY,
annuity in will determinable on, effect of discharge during executor's year, *4*, 218
Courts (Emergency Powers) Acts, leave necessary under, *5*, 126
mortgagor's consent under does not preclude, *5*, 127, 128
deed of arrangement, estoppel by conduct, *4*, 92
of lessee, effect on rent and disclaimer, *5*, 66

BENEFICES,
union of, *4*, 4

BOND,
donatio mortis causa of, *4*, 398, 399, 407

BUILDING
agreement, date of obligation under Courts (Emergency Powers) Acts, *5*, 220
contract, assignment of benefit of, *5*, **355, 399**
specific performance of, *4*, 319, 320

BUILDING SCHEME,
restrictive covenants, *4*, 91

BUILDING SOCIETY,
assignment of continuing arrangement, *5*, **347, 397**
Building Societies Act, 1939...*4*, 370 *et seq.*
additional securities permitted under, *4*, 172, 173
" basic advance " under, *4*, 171, 174, 175
" certified buildings ", *4*, 176
continuing arrangement, *5*, 347, 348
duties of vendor, *4*, 371—374
" excess advance ", *4*, 171, 174, 175
notice of additional security under, *4*, 177, 373
pool agreement, *5*, **347**

[*Italic figures indicate volume number; black figures indicate Precedents.*]

BUILDING SOCIETY—*continued.*
investments permitted to, *4*, 365
liability for untrue statements, *4*, 368, 369
mortgage of registered land, *4*, 305
to, collateral security fraudulent misrepresentation, *4*, 329, 369
ultra vires doctrine and, *4*, 360 *et seq.*

CAPITAL MONEY,
small dwellings, cost of building allowed out of, *4*, 321

CAUTION,
mortgage off register protected by, *4*, 301, 304

CHARITY,
cy-près principle applied to surplus funds, *5*, 198 *et seq.*
legacy " for the benefit of the choir ", construction, *4*, 424
fund administered at discretion of committee, validity of, *4*, 434
religious purposes, trust for, *5*, 311
training boys for Royal Navy, trust for, *5*, 312
uncertainty, bequest " for parish work ", *4*, 217
charitable or benevolent objects, *5*, 65, 73, 226
will, clause giving residue on trusts to be selected or founded by trustees, *4*, **540**
legacy to such charity as trustees or executors select, *4*, **497**

CHATTELS,
delivery of, as *donationes mortis causa*, *4*, 383, 384

CHILDREN, CHILD,
construction of gift over in default, in will, *5*, 74

CHOSE IN ACTION,
donatio mortis causa, subject of, *4*, 397—400

CIVIL DEFENCE ACTS, 1937 AND 1939,
air raid shelters, individual, provided by Crown, *4*, 21
private, in factories, etc., *4*, 13—20
public, *4*, 6—11
" annual value ", meaning of, *4*, 9, 18, 19
appeals under, *4*, 8, 17
appropriation of land under, *4*, 11, 12
" commercial building ", meaning of, *4*, 439
notice under should be registered as local land charge, *4*, 7
official arbitrator, reference to, *4*, 18
power to purchase under, *4*, 12
residential buildings, provisions as to, *4*, 22—24

CLASS GIFT,
condition subsequent and failure, perpetuity rule, *4*, 214

CLEARANCE ORDER,
demolition under, easement of support of adjoining house, *4*, 84

COAL ACT, 1938,
concurrent leases under, *5*, 63

CODICIL
postponing conversion and payment of legacies during war, *4*, **464**

COMPANY,
agreement by, for assignment of benefit of building contract, *5*, **399**
appointment by, in voluntary liquidation, of new trustees of property held on statutory trusts, *4*, **498**
assignment by, of building contract with local authority, *5*, **355**
conveyance by, in liquidation, *4*, **501**
debenture, whether mortgage is, *4*, 428, 429; *5*, 182, 184
estate duty, bonus shares issued within three years of the death, *4*, 339
executor's right to registration as shareholder, *5*, 152
letter to the Treasury asking for sanction to issue capital under Defence (Finance) Regulations, *4*, **513**

COMPENSATION,
acquisition of land under Defence Acts, *4*, 54—61
how assessed, *4*, 55, 56
anomalies under Compensation (Defence) Act, *4*, 117 *et seq.*
disturbance, compulsory purchase, *5*, 299
fixtures, for, where land compulsorily acquired, *4*, 57
Ribbon Development Act, 1935, under, *5*, 295
under Agricultural Holdings Act, where tenant of two holdings receives notice to quit one, *4*, 94
Compensation (Defence) Act, 1939...*4*, 9, 12, 20
hire-purchase goods, for, *4*, 359
War Damage Act, 1941...*5*, 256

CONDITIONS OF SALE,
war damage between contract and completion as to, *4*, **252**

CONFLICT OF LAWS,
intestate succession, *4*, 333
movable or immovable, debenture stock purchased with proceeds of sale, *4*, 425

CONSOLIDATION,
registered charge, *4*, 297, 298

CONTRACT,
agreement on hire-purchase terms, validity, *5*, 294
deposits and payments on account, distinction between, *5*, 83—85
enemy alien with, effect of war on, *4*, 270, 271
house agent's commission, *5*, 294
illegal and *ultra vires* distinguished, *4*, 361, 362
option to purchase in lease, notice to exercise, failure to complete, *4*, 223
war legislation, leave to forfeit deposit, *4*, 319
written memorandum, informal, *4*, 216

CONVEYANCE
by company in liquidation, the liquidator not being a party, *4*, **501**
by surviving tenant-in-common, *4*, **535**
of land settled before 1926, where no vesting deed, *5*, **394**
of moiety of proceeds of sale of freeholds subject to existing mortgage, *4*, **525**
of parsonage house under Parsonages Measure, 1938...*4*, **537**
to Secretary of State for Air, compulsory purchase, *4*, **516**

CORPORATION,
contract *ultra vires*, effect of, *4*, 360 *et seq.*

COSTS
of solicitor, charging order, *4*, 422
on sub-sale, *4*, 194—197

COURTS (EMERGENCY POWERS) ACTS, 1939 AND 1940,
alien enemies and, *5*, 20
appeals, *5*, 23
appointment of receiver, evacuated area, *5*, 218
assignment of lease after, whether new contract, *5*, 307
bankruptcy and winding up, *5*, 126, 127
building agreement, date of obligation, *5*, 220
creditors, representation of, *5*, 20, 21
Crown, rights of, how affected, *5*, 4, 301
deposit, forfeiture of, effect on, *5*, 11, 63, 64, 94, 95
failure to obtain leave for appointment of receiver, *4*, 423
hire-purchase contract, effect on, *4*, 355, 356; *5*, 10, 303
leave to proceed, *5*, 9, 62
sell, mortgagee's application, *5*, 118
time for, *5*, 121
lessor's judgment against sub-lessee where underlease mortgaged, *4*, 430
mortgage, no leave to sell if no personal obligation, *5*, 218, 300
protection of, cannot be waived, *4*, 356; *5*, 5
receiver for debenture holders, sale by, *5*, 218
service of counter-notice in action for possession, practice, *5*, 219
" unable immediately to pay ", *5*, 16, 17

COVENANT
brewery, to deal exclusively with, *5*, **375**
by intended wife to pay income and surtax, *5*, **396**
by landlord to accept lower rent while tenant on war service, *5*, **335**
by purchaser of proceeds of sale to observe covenants, *4*, **527**
pay mortgage debt and interest, *4*, **527**
implied in registered charge, *4*, 292
not to permit sale of tobacco, etc., whether sale of cigarettes in teashop is breach, *4*, 330
positive, burden does not run with land, *4*, 315
to insure against damage from air, *4*, 317
voluntary, action for damages on, *4*, 71 *et seq.*

CROWN,
Courts (Emergency Powers) Acts do not bind, *5*, 301

CUSTOM,
mines, to let down surface, *5*, 61

CY PRÈS DOCTRINE,
application of, to surplus charitable funds, *5*, 198 *et seq.*
where charitable intention clearly shown and trusts fail, *4*, 540

DAMAGE,
natural rights and, *4*, 326, 327

DAMAGES,
measure of, breach of contract, *5*, 83 *et seq.*

DEATH DUTIES,
annuities, on, *5*, 412
bequests free of, *5*, 271 *et seq.*
" free of all duties ", meaning of, *5*, 275
fund for payment out of, *5*, 276
transfer of assets, *4*, 447, 448

DEBENTURE,
mortgage of land by company, whether, *4*, 428

DEED,
by mortgagor authorising mortgagee to exercise statutory powers without leave of Court, *4*, **522**
confirming mortgage lost by enemy action, *5*, 408
of arrangement, estoppel by conduct, *4*, 92, 93
of temporary release of covenant to pay annuity, *4*, **519**

DEFENCE (EVACUATED AREAS) REGULATIONS, 1940...*5*, 47—51
" unoccupied " premises, meaning, *5*, 48

DEFENCE (FINANCE) REGULATIONS, 1939,
letter to the Treasury under, for sanction to issue capital, *4*, **513**

DELIVERY,
donationes mortis causa sufficient, what is, *4*, 383 *et seq.*

DEMOLITION ORDER,
improvement within Landlord and Tenant Act, 1927...*4*, 222
liability of corporation, easement of support to adjoining house, *4*, 84, 423

DEPOSIT
agreement conditional on title, *5*, 93
notice of forfeiture of, *5*, 140

DETERMINABLE FEE,
conveyance under School Sites Act, *4*, 80

DISCLAIMER,
notice of, of lease, where war damage, *4*, 41, 42

DISCRETIONARY TRUST
in will, for education of grandchildren, *4*, **485**
for parents and brothers and sisters, *4*, **489**
power of advancement, whether other consent required, *4*, 322
trustees' power to raise money for maintenance during war, *4*, **491**

DISTRESS,
Courts (Emergency Powers) Act, effect on, *4*, 35, 36
execution within Landlord and Tenant Act, 1709...*4*, 96
severance of term, right for reimbursement for whole rent paid under threat, *4*, 95
sum equivalent to rent paid by stranger, *5*, 68

DIVORCE,
child allowance to divorced wife, income tax, *4*, 108, 339
separation deed, agreement to live apart, effect on proceedings, *5*, 216

[*Italic figures indicate volume number; black figures indicate Precedents.*]

DOMICIL
of choice, estate duty and, *5*, 159
of company, income tax, *5*, 154
" ordinarily resident ", meaning of, *5*, 158

DONATIO MORTIS CAUSA,
bankers' deposit notes, *4*, 407
bills of exchange, *4*, 410, 411
cheques drawn by donor, *4*, 411—414
delivery of, *4*, 383 *et seq.*
agent, to, *4*, 395
antecedent and subsequent, *4*, 388, 389
constructive, *4*, 389—392
Post Office securities, *4*, 408
stock and share certificates, *4*, 415

DWELLING-HOUSE
let subsequent to passing of 1920 Act, *4*, 224

EASEMENT,
equitable, agreement to supply water, *4*, 530
right to park cars, cannot be, *4*, 212
support, demolition of adjoining house, liability of corporation, *4*, 84, 423

ESTATE DUTY,
annuity on, *5*, 412
clause providing for payment out of legacy, *5*, **276**
exemption from, soldiers and seamen, *4*, 163
exoneration from, power to appoint income up to stated annual amount, *5*, 157
gift *inter vivos*, identification of property to be valued, *4*, 111
of shares, subsequent bonus shares issued within three years of death, *4*, 339; *5*, 158
New York settlement, death of tenant for life, *4*, 108
" ordinarily resident ", meaning of, *5*, 158
policy moneys, aggregation of, including reversionary bonuses, *4*, 110
property not passing to executor as such, *4*, 110
testamentary expenses legacies out of mixed fund, *5*, 228

ESTOPPEL,
conduct by, deed of arrangement and, *4*, 92, 93

EVACUATION AREAS,
mortgages in, *5*, 133 *et seq.*

EXECUTION,
judgment by default against executors, rebuttable presumption of *devastavit*, *4*, 102
rent, preferential claim for, where, *4*, 96; *5*, 222

EXECUTION OF TRUSTS (EMERGENCY PROVISIONS) ACT, 1939,
power of attorney under, by tenant for life, *4*, **476**
trustee, *4*, **473**, **533**
statutory declaration as to war service, *4*, **478**

[*Italic figures indicate volume number; black figures indicate Precedents.*]

EXECUTOR,
appointment of, during war period, with substitution of another after war, *4*, **482**
assets including shares, right to registration as shareholder, *5*, 152
future contingent liabilities and distribution by, *5*, 70
right of retainer, costs of administration action, *4*, 101

FACTORIES,
Civil Defence Acts provisions as to, *4*, 13—21

FACULTY
for erection of columbarium in connection with cremation, *4*, 115

FINANCE ACT, 1936. *See also* INCOME TAX.
section 21 (8) and (10)...*4*, 106
settlement, meaning of, under, *4*, 105, 106
transfer of assets, s. 18...*5*, 154

FIRE,
covenant to insure against, war damage, effect on, *4*, 240, 241, 258—260

FISHERY,
powers under Defence Regulations as to, *4*, 69, 70
proof of grant before Magna Carta, *4*, 89

FIXTURE,
compensation for removal under Defence Acts, *4*, 57
tenants', petrol pumps, *4*, 438
removable shed on concrete floor, *4*, 437

FORFEITURE
clause in will, uncertainty, *4*, 442, 443
deposit, of, Courts (Emergency Powers) Acts, effect on, *5*, 11, 12, 302
provision for in default of instalments in agreement for purchase of freeholds, *5*, **338**
will, uncertainty, gift over if donee should marry anyone not "of the Jewish faith", *5*, 312

FRAUD
in exercise of power of appointment, *4*, 211

FRUSTRATION,
doctrine of, *4*, 135 *et seq.*
hire-purchase contract, *4*, 352
lease, how affected, *4*, 139, 146, 147

FURNITURE,
destruction by war without vendor's knowledge, effect on contract, *4*, 273

FURTHER CHARGE
in favour of first mortgagees advancing money for war repairs, *5*, **401**

GUARANTEE,
liability during evacuation period, *5*, 138

HIGHWAY,
Civil Defence Acts, powers as to shelters under, *4*, 7, 10, 11
injury to users of, liability of landlord for, *5*, 67, 110—115

HIRE-PURCHASE
agreement " on hire-purchase " terms, validity of contract, *5*, 294
to surrender article, Courts (Emergency Powers) Act, *5*, **303**
Courts (Emergency Powers) Act, provisions as to, *4*, 355, 356
credit-sale, distinguished from, *4*, 348, 349
Defence (Evacuation Areas) Regulations, *5*, 51, 52
Liability for War Damage Act, provisions as to, *4*, 350—355
option to purchase essential of, *4*, 349
price restrictions under Price of Goods Act, *4*, 359
war damage, statutory provisions as to, *4*, 51, 52, 61, 350—354

HIRE-PURCHASE ACT, 1938,
consideration less than £50...*4*, 316
price, how determined, *4*, 353

HOTCHPOT
clause in will, negativing, *4*, **486**
share of residue, date for valuation, *4*, 101

HOUSING ACT, 1936,
notice under, improvements payable out of capital, *5*, 221
rent not exceeding £40...*4*, 222, 435; *5*, 172, 173
condition implied as to fitness, *5*, 172, 307

HOWE v. *LORD DARTMOUTH*, RULE IN,
apportionment, unauthorised investments in settled residuary gift, *4*, 439
clause in will negativing rule, *4*, **521**

HUSBAND AND WIFE,
covenant by intended wife to pay income and surtax, *5*, **396**
payment to divorced wife for maintenance of children, income tax, *4*, 108, 339

ILLEGITIMATE CHILD,
legitimated, cannot take under intestacy before 1926...*5*, 317
maintenance of, Inheritance (Family Provision) Act, 1938...*5*, 319

IMPOSSIBILITY
of performance, *4*, 134, 137, 144

IMPROVEMENTS,
conversion of dwelling-house into shops under Settled Land Act, 1925...*4*, 82
demolition, under Landlord and Tenant Act, 1927, whether, *4*, 222
Settled Land Act, 1925, payable out of capital, *5*, 221

INCOME TAX,
annual payment, before passing of Finance Act, *5*, 232
revocable covenants for, *5*, 233
annuity by will, free from income tax, reliefs and allowances, *4*, 105, 336, 337; *5*, 412
" free of all deductions ", *4*, 424
deficiency made up out of capital, *4*, 445
purchase of, unexhausted balance, capital or income, *5*, 231

INCOME TAX—*continued.*
child allowance, payments to divorced wife for children's maintenance, *4*, 108, 339
" clear yearly sum " burden of proof, *5*, 299
covenant by intended wife to pay, *5*, 396
mortgagee in possession, redemption action, *4*, 338
person " by or through whom " payments made, *4*, 107
settlement, meaning of, in Finance Act, 1936, income settled on children, *4*, 105, 106
surtax, annual payments, *5*, 156
covenant to pay proportion of income, *5*, 154, 229
settlor entitled to loans from trustees, *4*, 446
voluntary settlement, " interest " in income, *5*, 319
transfer of assets, taxation and death duties, *4*, 447
income to persons abroad, *5*, 234

INDEMNITY
to trustees, by tenant for life and remainderman for postponement of conversion of residue during war, *4*, **471**

INDUSTRIAL AND PROVIDENT SOCIETIES (AMENDMENT) ACT, 1913,
death of nominee in life of nominator, *5*, 76

INFANT
appointment of new trustee by, *5*, 141
seaman, will of, *4*, 162
soldier, will of, " on actual military service ", *4*, 151 *et seq.*

INHERITANCE (FAMILY PROVISION) ACT, 1938,
applications under, for maintenance, *5*, 317—319
order under, *5*, 79
statement of reasons under, *5*, 390, **392**

INSURANCE
against fire, war damage, *4*, 147—150, 240, 241, 258—260, 317; *5*, 129
mortgagee, provision as to, *4*, **511**
war risks, covenant to obtain, *4*, 250
exclusion of agriculture from compulsory, *5*, 24

INTESTACY,
conflict of laws, Italian domicil of choice, *4*, 333
real estate in Australia, intestacy, *5*, 310

INVESTMENT
by trustees, statutory and express powers, *4*, 92
under National Loans Act, 1939...*4*, 114
valuation of, and apportionment on death of tenant for life, *4*, 332

JOINT TENANTS,
appointment of new trustees of proceeds of sale, *4*, **528**
lease, Landlord and Tenant (War Damage) Act, *4*, 247, 248
severance of, *4*, 378—382
additional modes under L. P. Act, 1925...*4*, 380

JUDGMENT,
lessor's, against sub-lessee, where underlease mortgaged, *4*, 430

[*Italic figures indicate volume number; black figures indicate Precedents.*]

LAND CERTIFICATE,
agreement to lodge, in purchase of freeholds, *5*, **346**
deposit of, protected by notice, *4*, 303
destroyed by enemy action, *5*, 82

LAND CHARGES ACT, 1925,
registration of notices under Civil Defence Acts, *4*, 7

LAND REGISTRATION ACT, 1925,
compulsory registration under, extension of, *4*, 200—203
section 122, importance of, *4*, 199

LANDLORD AND TENANT,
bankruptcy of lessee, effect on rent and disclaimer, *5*, 66, 67
breach of covenant to pay all assessments and outgoings, landlord able to recover apportioned sum, *4*, 221
Courts (Emergency Powers) Act, as to, *4*, 35—38
covenant not to permit sale of tobacco, etc., whether cigarettes sold by tea-shop breach, *4*, 330
to spend £50 per annum in repairs, damages or debt, *4*, 220
execution, preferential claim for rent where, *4*, 96; *5*, 222
furnished house, implied warranty as to, *5*, 169, 170
highway, landlord's liability as to, *5*, 67
lift, liability as to, *5*, 304
" rent not exceeding £40 ", whether exclusive of rates, *4*, 435
repairs, contract for, express, *5*, 163
implied, *5*, 167
liabilities as to, *5*, 100 *et seq.*, 261 *et seq.*
safety of demised premises, no implied obligation as to, *4*, 221
service flat, rateable value and rent of, *5*, 145
tenant's fixtures, removability of, *4*, 437, 438
" unfit " premises, meaning of, *4*, 41
war, effect on, *4*, 39—44, 138, 234. *See also* LANDLORD AND TENANT (WAR DAMAGE) ACT.

LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939,
agreement as to repair of war damage where premises not unfit, *5*, **364**
rendered unfit, *5*, 367
agricultural leases under, *5*, 25
anomalies under, *4*, 234—250; *5*, 362
assignor of lease, position of, *4*, 246, 247
covenant to repair, effect on, *4*, 237
effect of notice to avoid disclaimer, *5*, 305
further charge in favour of mortgagees advancing money for repairs, *5*, **401**
Housing Act, 1936, repairs under and, *4*, 249
joint tenants of lease, as to, *4*, 247
licence, repairing clause in, *4*, 238
mortgagor's duty to serve notice, *5*, 401
notices under, *4*, 237
by former landlord or tenant to successor in title, *4*, **463**
by landlord to tenant to elect, *4*, **456**
by tenant or mortgagor, of war damage, *4*, **449**
to sub-tenant to elect, *4*, **457**
counter-notice by tenant to landlord, *4*, **460**
of disclaimer, *4*, **451**
of ground lease, *4*, **461**
of part of premises, in multiple lease, *4*, **462**
to sub-tenant or mortgagee, *4*, **453**

[*Italic figures indicate volume number; black figures indicate Precedents.*]

LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939—*continued.*
notices under, of receipt of notice of disclaimer, *4*, **454**
of retention of lease by tenant, *4*, **456**
of war damage by tenant or mortgagor, *4*, **449**
to avoid disclaimer by landlord, *4*, **459**
to landlord of service of notice to elect on sub-tenant, *4*, **458**
"unfit", meaning of, *5*, 306, 364
waiver of rights under, *5*, **368**
war damage, meaning of, *4*, 234—236

LAW OF PROPERTY ACT, 1925,
lessee's mortgagees, relief to, under, *4*, 87, 224
mortgage, provision in as to applications under section 84...*4*, **509**, **512**
restrictive covenants, application for discharge under, *5*, 64

LAW REPORTS,
Commission on, report of, *4*, 346

LEASE,
agreement for "subject to lease drawn up by our client's solicitors", construction of, *4*, 83
clauses in:
cesser or abatement of rent where war damage, *4*, **130**
landlord's covenant to accept lower rent while tenant on war service, *5*, **335**
power to determine, *5*, **333**, **336**
if tenant transferred by employer, *5*, **363**
progressive rent, proviso for, *5*, **330**
proviso following landlord's covenant to pay rates, *4*, **128**
repairing covenant, qualification of, for damage due to compulsory occupation, *4*, **131**
Courts (Emergency Powers) Act, 1939, effect on, *4*, 35, 36
disclaimer of, owing to war damage, *4*, 41, **451**
forfeiture of, for breach of covenant, rights of mortgagee, *4*, 87
frustration of, where premises destroyed, *4*, 146, 147
ground, position under Landlord and Tenant (War Damage) Act, 1939...*4*, 244
multiple, under War Damage Act, *4*, 43, 242—244
of new dwelling-house, at full rack rent providing for reduction, *5*, **333**
at progressive rent to prevent low rent becoming standard rent, *5*, **329**
option to purchase, notice to exercise and failure to complete, *4*, 223
under Coal Act, concurrent, *5*, 63
war damage, effect on, *4*, 39—42, 145—148
See also LANDLORD AND TENANT (WAR DAMAGE) ACT.

LEGACY,
donatio mortis causa, distinguished from, *4*, 384
provision for reduction if value of estate below certain figure, *4*, **465**

LEGACY DUTY,
annuity on, **5**, 412
bequests free from, *5*, 272—275
direction in will to pay where legacies contingent on amount of income, *4*, **543**

LEGAL CHARGE,
deed of, in favour of first mortgagees substituting post-war for pre-war security, *4*, **479**

LETTER
to the Treasury asking for sanction under the Defence (Finance) Regulations to issue capital, *4*, **513**
to trustees of secret trust, *5*, **384**

LIABILITY FOR WAR DAMAGE (MISCELLANEOUS PROVISIONS) ACT,
provisions as to hire-purchase, *4*, 350—355

LICENCE,
repairing clause in, war damage and, *4*, 238
to erect air-raid shelter, *5*, 161, **370**

LIFT,
landlord's liability in respect of, *5*, 304

LIMITATION ACT, 1939,
acknowledgment as to land and rent, *4*, 190—192
action to recover land under, *4*, 180, 181
by the Crown, *4*, 181
arrears of interest under, *4*, 186
disability, effect of, *4*, 189
mortgages of real and personal estate, *4*, 187

LIQUIDATION,
company in, appointment of new trustee by, *4*, **498**
conveyance by, liquidator not being a party, *4*, **501**

LOCAL AUTHORITY,
approval of air raid shelter by, proviso for obtaining, *5*, **371**, 371
consent of, to assignment of building contract, *5*, **355, 358**
loans to, for repairing war damage, *4*, 62
public air-raid shelters, powers as to, *4*, 6—11

LOCAL LAND CHARGES,
notice by local authority of user of premises for civil defence, *4*, 7, 18

MARRIAGE SETTLEMENT,
heads of proposed, of personal estate, *4*, **494**

MEMORANDUM,
informal written, sufficient for contract, *4*, 216

MIDDLESEX DEEDS REGISTRY,
closing of, *5*, 2, 3

MINES,
Civil Defence Acts, provisions as to, *4*, 13—21
customary and prescriptive right to let down surface, *4*, 88, 422; *5*, 61

MORTGAGE,
appointment of receiver, evacuated area, *5*, 218
building society, collateral security, fraudulent misrepresentation, *4*, 329
pooling agreement, *4*, 363, 364
caution, protected by, *4*, 302
clauses in:
application under L. P. Act, 1925, s. 84, as to, *4*, **509, 512**

MORTGAGE—*continued.*
clauses in:
assignment of compensation money, *5*, **404**
costs of mortgagees, provision for, *4*, **512**
covenant to appoint manager and servants, *4*, **508**
insure against war damage, *5*, **406**
keep accounts, *4*, **507**
make good war damage, *5*, **406**
observe covenants of lease, *4*, **506**
repair and insure, *4*, **507**
further charge, *5*, **404**
power to have buildings surveyed, *4*, **508**
pay off principal, *4*, **506**
powers of mortgagees, *4*, **510**, **511**
receivers, *4*, **512**
company, by, of land whether debenture, *4*, 428; *5*, 182, 184
continuing agreement, providing for, *5*, **347**
conveyance subject to, where purchaser covenants to pay mortgage debt, *4*, **525**
Courts (Emergency Powers) Act, 1939, effect on, *4*, 45, 46; *5*, 53—59, 62, 124, 217, 218
covenant to insure against damage from the air, *4*, 317
deed confirming, where original lost by enemy action, *5*, **408**
evacuation areas, *5*, 133—139
foreclosure, vesting order where mortgagor fails to convey, *4*, 431
further charge to first mortgagees advancing money for war damage repairs, *5*, **401**
leave necessary to realise where no personal liability, *5*, 300
legal charge to substitute post-war for pre-war security, *4*, **479**
proviso saving existing mortgage, *4*, **481**
notice of additional security under, *4*, **373**, **374**
of block of flats where mortgagor obliged to provide heating, etc., *4*, **504**
Possession of Mortgaged Land (Emergency Provisions) Act, 1939...*5*, 116, 117
postponement of date for payment of principal, *4*, **480**
second, *5*, **403**
receiver appointed without leave under Courts (Emergency Powers) Act... *4*, 433
registered charge, by, *4*, 290—299
land, of, building society by, *4*, 305
equitable charge by, *4*, 304
foreclosure, *4*, 306
land certificate, by deposit of, *4*, 303
right to redeem postponement of, *5*, 178 *et seq.*
rule against perpetuities, whether applicable to, *4*, 429, 430
tacking, agreement for, *5*, **403**
Treasury sanction for loan exceeding £10,000...*4*, 113
war, effects on, *5*, 116 *et seq.*

MORTGAGEE,
appointment of as attorney by mortgagor, *4*, **522**
in possession, tax paid by, redemption action, *4*, 338
mistake between first and second, effect of, *4*, 432
notice to, of forfeiture of lease, *4*, 87
restrictions on powers of, by Courts (Emergency Powers) Act...*4*, 45; *5*, 53—59

MORTGAGOR,
deed by, authorising mortgagee to exercise statutory powers without leave of Court, *4*, **522**

[*Italic figures indicate volume number; black figures indicate Precedents.*]

NAME,
change of, advertisement of, under Defence (General) Regulations, 1939... *5*, **354**

NATURAL RIGHTS,
damage by tree roots, nuisance, *4*, 326
lateral support of land, *4*, 326
riparian owners, diversion of stream, *4*, 324

NOTICE
of want of repair, tenant's duty to give, *5*, 110
under Building Societies Act, 1939, of additional security, *4*, **373, 374**
Landlord and Tenant (War Damage) Act, 1939...*4*, 40—42
of disclaimer of lease by sub-tenant, *4*, **453**
tenant, *4*, 41, **451**
part of premises in multiple lease, *4*, **462**
receipt of notice of disclaimer, *4*, **454**
retention of lease by tenant, *4*, 42, **456**
to avoid disclaimer by landlord to tenant, *4*, **459**
to elect, by landlord, *4*, **456**
by tenant to sub-tenant, *4*, **457**
to landlord of service of notice to elect on sub-tenant, *4*, **458**
war damage by tenant or mortgagor, *4*, **449**

NUISANCE,
caused by non-repair, liability for, *5*, 102 *et seq.*
damage by tree roots, *4*, 326
dangerous premises, liability for, *5*, 261 *et seq.*
highway, liability to passers by for, *5*, 110—115
letting scheme, landlord's obligation, *5*, 69
public and private, *5*, 102, 103
Rylands v. *Fletcher*, *5*, 115
snow falling from roof, *5*, 296

NULLITY
of second marriage, whether bequest during widowhood revived, *4*, 216

OCCUPATION,
beneficial and rateable, *4*, 188 *et seq.*

OPTION
to purchase, in hire-purchase contract, *4*, 349
in lease, notice given to exercise but failure to complete, *4*, 223
in will, apportionment of dividends of shares, *4*, 328
whether personal to donee, *5*, 74, 151

PARSONAGES MEASURE, 1938,
conveyance of parsonage house under, *4*, **537**

PART PERFORMANCE,
payment of deposit, effect on, *5*, 90

PARTNERS,
agreement between, to regulate affairs during war, *4*, **467**
deed modifying articles, where one partner on war service, *4*, **469**
enemy, profits of, *4*, 269

PENALTY,
liquidated damages distinguished from, *5*, 89, 90

PERPETUITIES, RULE AGAINST,
forfeiture clause, change of religion, *4*, 210, 214
legacy to trustees of fund part charitable, *4*, 434
mortgages, whether within, *4*, 429
settled legacy, forfeiture clause, whether severable, *4*, 333
several of interests in class gifts, condition subsequent, *4*, 214

PERSONAL REPRESENTATIVES,
registered charge powers, as to, *4*, 294

POLICY MONEYS,
aggregation of, for estate duty, *4*, 110
on life of child, whether in trust, *5*, 309

POWER OF APPOINTMENT,
" after any marriage ", meaning of, *4*, 432
special, fraudulent exercise of, *4*, 211
release as regards one particular object, *4*, 85
whether exercised by bequest of " my " shares, *5*, 78

POWER OF ATTORNEY,
alien enemy of, contract by, *4*, 271, 272
clause referring to Evidence and Power of Attorney Act, 1940...*5*, **378**
Evidence and Power of Attorney Act, 1940...*5*, 185—187
recital as to, *5*, **378**
mortgagee appointing mortgagor, *4*, **522**, **524**
tenant for life on war service, by, *4*, **476**
trustee on war service by, *4*, 48, 49, **473—476**, **533**

PRESCRIPTION,
right to let down surface without compensation, *4*, 88, 422

PROBATE,
entry out of time, practice, *5*, 217

PUBLIC POLICY,
testator killed by legatee, administration, *5*, 310

QUEEN ANNE'S BOUNTY,
receipt by, in conveyance under Parsonages Measure, *4*, **538**

RECEIVER,
appointment of, failure to obtain leave under Courts (Emergency Powers) Act, 1939...*4*, 433; *5*, 218
evacuated area, mortgage in, *5*, 218

RECITALS,
agreement for compulsory acquisition, *4*, **517**
for sale by company in liquidation, *4*, **502**
of moiety of proceeds of sale, *4*, **526**
to advance money for war damage, *5*, **500**
to appropriate, *4*, **492**
appointment of liquidator, *5*, **356**

[Italic figures indicate volume number; black figures indicate Precedents.]

RECITALS—*continued.*
building contract, *5*, **356**
certificate of Lord Lieutenant under Defence Acts, *4*, **516**
continuing arrangement, *5*, **397**
conveyance to tenants in common, *4*, **535**
deed lost by enemy action, *5*, **408**
of arrangement, *4*, **544**
of suretyship, *5*, **356**
further security in mortgage, *4*, **480**
legal charge, *4*, **516**
mortgage, *4*, **479**; *5*, **373, 402**
notice to treat, *4*, **517**
Parsonages Measure, compliance with, *4*, **537, 538**
registration of land charge, *5*, **402**
resolution for liquidation, *5*, 356
seisin of, *4*, **525**
sporting rights, licence of, *4*, **517**
trustee, desire to appoint new, *4*, **500**
valuation of property, *4*, **492**
voluntary winding up of company, *4*, **499**
war damage, notice of, *5*, **402**
winding up, order for, *4*, **501**

RECTIFICATION,
mistake and, burden of proof, *5*, 298
settlement, of, lack of proper words of limitation, *5*, 144

REGISTERED CHARGE,
consolidation, notice of, *4*, 297, 298
contract for loan and investigation of title, *4*, 290
covenants implied in, *4*, 292
discharge of, *4*, 301
fees, *4*, 299, 300
general rules as to, *4*, 291—299
personal representatives, power to make, *4*, 294
priority as to, *4*, 297
transfer of, *4*, 301
trustees, *4*, 295

REGISTERED LAND,
compulsory area, extension of, *4*, 198—203
conveyances of, merits of, *5*, 277 *et seq.*
covenants binding on land, *5*, 60
for indemnity, *4*, 114
Fee Order, 1939...*4*, 308—310
mortgages, permitted types in, *4*, 289
positive covenant, burden not running with land, *4*, 315
report of Chief Land Registrar, 1939...*4*, 2, 3

REGISTRATION,
charge for repairing war damage, *4*, 63

RELEASE
by mortgagor of restrictions under Courts (Emergency Powers) Act, 1939 and Rent Acts, *4*, **522**
of covenant to pay annuity, temporarily, *4*, **519**
of special power as regards one particular object, *4*, **85**

RENT,
acknowledgment as to, *4*, 190, 191
Defence (Evacuated Areas) Regulations, *5*, 47
" unoccupied " premises under, *5*, 48
destruction of premises, lessee's liability as to, *4*, 141, 142
execution, preferential claim for, under Landlord and Tenant Act, 1709...*4*, 96
progressive, provision for in lease, *5*, **330**
proviso for cesser and abatement due to war damage, *4*, **130**; *5*, **362**
" rent not exceeding £40 ", Housing Act, 1936...*4*, 222
right of reimbursement of, paid under threat of distress after severance, *4*, 95
service flat, of, *5*, 145—148
standard, of new premises, *5*, 34—37

RENT AND MORTGAGE INTEREST RESTRICTIONS ACTS,
Act of 1939...*4*, 26—34
actual possession, by handing over key, *4*, 226
" appropriate day ", meaning of, *4*, 27, 28
decontrol of houses, *4*, 26, 27
dwelling-house, house let after passing of Act of 1920...*4*, 224
let to tenant in consequence of employment, *5*, 225
enforcement of security, *5*, 130, 132
exceptions to, *5*, 129
increase of rent, *4*, 30, 31
lease within, at progressive rent to prevent fixing standard rent, *5*, **329**
at rack rent, *5*, **333**
licensed premises, *4*, 28
mistake in date in application for registration, *4*, 226
recontrol by failure to register under Act of 1933...*4*, 438
release of restrictions under, by mortgagor, *4*, **523**, **524**
standard rent of new premises, *5*, 34—37, 131

REPAIRS,
covenant for, express, *5*, 163
implied, *5*, 167
fair wear and tear, compensation for war damage, *4*, 120, 121
Housing (Emergency Powers) Act, 1939...*4*, 64, 65
proviso as to damage done under compulsory powers, *4*, **131**
war damage, essential buildings, *4*, 61, 62
plant, *4*, 63
liabilities as to, *4*, 40—42; *5*, 177, 178
See also LANDLORD AND TENANT (WAR DAMAGE) ACT.

RESCISSION,
notice of, while action for specific performance still on file, *4*, 426, 427
where property destroyed between contract and completion, *4*, 253

RESTRAINT OF TRADE,
solicitor's articled clerk, *4*, 421

RESTRICTIVE COVENANTS,
application for discharge, under L. P. Act, 1925...*5*, 64, 65
building scheme, *4*, 91
provision in mortgage for applications under L. P. Act, 1925, s. 84...*4*, **509**, **512**

REVOCATION
of settlement, meaning of in Finance Act, 1936...*4*, 106, 107
Finance Act, 1938...*5*, 40, 41
of will, covenant not to revoke, effect of marriage, *4*, 103
infant soldier, of, *4*, 157, 158

RIBBON DEVELOPMENT ACT,
compensation under, *5*, 295

RIGHT OF WAY
for horses and carts, whether right to use for motor traffic, *4*, 86

SCHOOL,
elementary, closing of, reverter to grantor under School Sites Act, *4*, 80, 212
restrictive covenant permitting, does not include school of music or dancing, *4*, 91

SEARCHES,
official, Form 94...*5*, 81
priority notices, *5*, 82

SEPARATION DEED,
agreement to live apart, effect on divorce proceedings, *5*, 216

SEQUESTRATION ORDER,
protected life interest, effect on, *5*, 143

SERVICE FLAT,
rateable value and rent of, *5*, 145

SETTLED LAND ACT, 1925,
capital money, costs of building flats allowed out of, *4*, 321
improvements payable out of, *5*, 221
conveyance under, where no vesting deed previously executed, *5*, **394**
" curtain ", provisions as to, *4*, 203—209
debenture stock purchased with proceeds of settled land, whether movable or immovable, *4*, 425, 441
improvements, conversion of dwelling-house into shops and flats, *4*, 82
payable out of capital, *5*, 221
order under, for trustees to exercise powers of tenant for life, *5*, 141

SETTLEMENT,
definition of, Finance Act, 1938...*5*, 39
heads of proposed marriage settlement of personal estate, *4*, **494**
New York settlement, estate duty on death of tenant for life, *4*, 108
power to appoint " after any marriage ", *4*, 432
revocation of, and Finance Act, 1938...*5*, 40, 41

SMALL TENEMENTS RECOVERY ACT, 1838,
jurisdiction of High Court after service of notice, *5*, 68

[*Italic figures indicate volume number; black figures indicate Precedents.*]

SOLICITOR,
costs of, charging order, *4*, 422
on sub-sale, *4*, 194—197
restraint of trade, articled clerk, *4*, 421
" subject to lease drawn up by our client's solicitors " contract and, *4*, 83

SPECIFIC PERFORMANCE,
building contract, *4*, 319, 320
notice to rescind while action still on file, *4*, 426, 427
voluntary covenant of, *4*, 72

SPORTING RIGHTS,
compensation for, where compulsory purchase, *4*, **518**
licence, recital of, *4*, **517**

STAMPS,
appointment of new trustee, *4*, 498
appropriation and assent to widow of intestate, *4*, 491
assignment of building contract, *5*, 355
lease at progressive rent, *5*, 329
legal charge substituting new security, *4*, 479
pool agreement, complying with Building Societies Act, 1939...*5*, 347
power of attorney under Execution of Trusts (Emergency Provisions) Act, *4*, 473
statutory declaration, *4*, 478
voluntary conveyance to trustees, *5*, 296

STATUTORY DECLARATION
by donee of power of attorney as to war service, *4*, 49, **478**

STATUTORY OWNER,
power of attorney by, on war service, *4*, **476**

STATUTORY POWERS,
reasonable execution of, natural rights of riparian owners, *4*, 324

STREAM,
riparian owners, rights of, *4*, 324

TENANCY AT WILL,
determination of, right of action, accrual of, *4*, 185

TENANT FOR LIFE,
indemnity by, to trustees for postponement of conversion of residue, *4*, **471**
Limitation Act, 1939, affecting, *4*, 183, 184
New York settlement, estate duty on death of, *4*, 108
powers of, trustees ordered to exercise, *5*, 141
war service, power of attorney on, *4*, **476**
statutory declaration as to, *4*, **478**

TENANT IN COMMON,
conveyance by surviving, *4*, **535**

TIMBER,
Defence Regulations, provisions as to, *4*, 70
nuisance, damage by tree roots, *4*, 326

[*Italic figures indicate volume number; black figures indicate Precedents.*]

TITLE,
adverse possession, by, Limitation Act, 1939...*4*, 184
assent, purchaser's right to require written, *4*, 376, 377
curtain, Settled Land Act provisions, *4*, 203—209
paramount, eviction by, *4*, 142, 146
survivor of joint tenants by, *4*, 381
transfer of chose in action, *donatio mortis causa*, *4*, 400

TRUST,
emergency provisions as to, *4*, 47—49
secret, communication and subsequent increase of amount of, *4*, 219; *5*, 388
letter prior to, to trustees, *5*, **384**

TRUST CORPORATION,
power to charge, *4*, 497

TRUSTEES,
appointment of new, by company in voluntary liquidation, *4*, **498**
by infant, *5*, 141
of proceeds of sale, *4*, **528**
assignment of book debts by, under deed of arrangement, *4*, **544**
delegation of powers of, emergency provisions as to, *4*, 47, 48
indemnity to, by tenant for life and remainderman for postponement of conversion during war, *4*, **471**
investment, statutory powers and " contrary intention " *4*, 92
Limitation Act, 1939, affecting, *4*, 183, 184
National Loans Act, 1939, power to invest under, *4*, 114
power of attorney by, on war service, *4*, **472**, **533**
" trustee unwilling to retire ", *5*, 142
undue influence and, *4*, 285—288

ULTRA VIRES,
building societies and doctrine of, *4*, 360 *et seq.*

UNDIVIDED SHARES,
acquisition under Limitation Acts, *4*, 81

UNDUE INFLUENCE,
agent and principal, *4*, 281, 282
personal influence, essence of doctrine, *4*, 275, 276
solicitor and client, *4*, 276, 277

VENDOR AND PURCHASER,
specific performance, notice to rescind while action on file, *4*, 426, 427

VESTING DEED,
recital of facts constituting, *5*, **394**

VESTING ORDER
where mortgagor fails to convey, *4*, 431

[*Italic figures indicate volume number; black figures indicate Precedents.*]

WAR,
absence of partner on war service, provision for, *4*, **468**
air raid shelters, *4*, 6—24. See also CIVIL DEFENCE.
aliens, enemy, *4*, 262, 263
lease of, *4*, 140
billeting accommodation, *4*, 67
compulsory acquisition of land by Secretary of State for Air, *4*, **516**
covenant to accept lower rent while tenant on war service, *5*, **335**
damage, affecting freeholds, sale of, *4*, 252—257
leases. *See* LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939.
agreement between landlord and tenant for repair of, *5*, **364**, **367**
further charge for repair of, *5*, **401**
obligation to repair, *5*, 177
provisions as to, in building contract, *5*, **359**
Defence Regulations, 1939...*4*, 65—70
emergency regulations, index to, *5*, 96—100, 293
hire-purchase contracts and, *4*, 51, 52, 357—360
housing repairs and, *4*, 64, 65
insurance against fire, *4*, 147—150; *5*, 129
legislation, *5*, 241 *et seq.*
landlord and tenant, *4*, 138. *See also* LANDLORD AND TENANT (WAR DAMAGE) ACT, 1939.
Navy and Marines Wills Act, 1939...*4*, 64
mortgages, *5*, 116 *et seq.*
powers of attorney by members of H.M. forces abroad, *5*, 185—187
Price of Goods Act, 1939, restrictions under, *4*, 359, 360
rent and mortgage interest restrictions, provisions as to, *4*, 26—34
repair of essential buildings, *4*, 61—63
tenancy agreement for period of, *5*, **360**
Trading with the Enemy Act, 1939...*4*, 266—268
value of money, provision as to alteration of, *4*, **468**
War Damage Act, 1941:—
assignment of right to compensation, *5*, 260
claims under, *5*, 259
compensation under, *5*, 256
contributions, how levied, *5*, 247
leases, effect on, *5*, 251
cost of works payment, *5*, 256
notification of damage, *5*, 254
temporary works payment, *5*, 257
value, assessment of, under, *5*, 245
payment, *5*, 257
war service, meaning of, *4*, 473
will providing for disappearance of legatee, *5*, **381**
wills of W.A.T.S., W.A.A.F., and W.R.N.S., *4*, 156, 157

WARRANTY,
implied in letting furnished house, *5*, 169
under Housing Act, 1936...*5*, 172

WATER,
agreement for supply of, to land of adjoining owner, *4*, **530**

[*Italic figures indicate volume number; black figures indicate Precedents.*]

WILL,
" actual military service ", meaning of, *4*, 151, 152, 154, 155
annuity, direction for appropriation, *5*, **412**
during war period, *4*, **484**
apportionment, settled and residuary gift and annuity, *Allhusen* v. *Whitel*, *4*, 99
tenant for life and remainderman, *4*, 332
assent implied or in writing under A. E. Act, 1925...*4*, 375—378
bequest during widowhood, subsequent marriage annulled, *4*, 216
charitable trusts, *cy près* application of surplus funds, *5*, 198 *et seq.*
residue given on, to be selected by trustees, *4*, **540**
charities, legacy to such as trustees or executors select, *4*, **497**
codicil postponing conversion and payment of legacies during war, *4*, **464**
construction, " all my horses ", extrinsic evidence, *5*, 150
annuities, insufficient assets, direction to set aside fund, gift over, *4*, 98
" charitable or benevolent objects ", *5*, 65, 73, 226, 311
class gift, vested, subject to be divested, gift over, *4*, 102
conflict of laws, movables and immovables, *4*, 425, 441
determinable annuity " until he shall become bankrupt ", *4*, 218
forfeiture dependent on state of mind, change of religion, *4*, 442, 443
gift to children of any child " who shall die in my lifetime ", words of futurity, *4*, 334
named donees " as shall die in my lifetime ", *5*, 75
gift to vicar " for parish work ", uncertainty, *4*, 217
legacy for " benefit of the choir ", *4*, 424
" securities and money ", meaning of, *4*, 219
" sisters-in-law and brothers-in-law ", *4*, 334
testamentary expenses, estate duty on realty, *5*, 228
covenant not to revoke, effect of marriage, *4*, 103
death duties, devises and bequests free from, *5*, 271 *et seq.*
direction to accumulate, *4*, **485**
discretionary trust for education of grandchildren, *4*, **485**
parents and brothers and sisters, *4*, **489**
enemies and enemy subjects, gifts to and by, *4*, 164
hotchpot clause negatived, *4*, **486**
Howe v. *Lord Dartmouth*, rule in, clause negativing, *4*, **521**
illegitimate children, providing for, *5*, **390**
Industrial and Provident Societies, etc., Act, will of nominator, *5*, 76
Inheritance (Family Provision) Act, 1938, order for maintenance under, *5*, **79**, 317—319
statement of reasons under, *5*, **392**
lapse, bequest contingent on reaching twenty-five where child predeceased testator, *4*, 104
testator died after 1925, beneficiary having died intestate before 1926... *5*, 316
legacies, contingent on amount of income produced by residue, *4*, **543**, **544**
provision reducing, if estate below certain figure, *4*, **465**
" mariners and seamen being at sea ", *4*, 160—164
naval assets, meaning of, *4*, 161
of bachelor, providing for parents and brothers and sisters, *4*, **487**
of widow, leaving greater part of estate to daughter and contingent legacies payable out of income, *4*, **542**

[*Italic figures indicate volume number; black figures indicate Precedents.*]

WILL—*continued.*
of widower or widow, providing for grandchildren and sons on war service, *4*, **482**
perpetuity, forfeiture for changing religion, *4*, 210, 214, 333
postponement of payment of legacies during war, *4*, **464**
power to raise money for maintenance during war, *4*, **491**
providing for principal beneficiary dying with testator, *5*, **381**
secret trust, legacy subsequently increased, *4*, 219; *5*, 388
letter prior to, *5*, **384**
soldier, of, *4*, 151 *et seq.*
" in actual military service ", *5*, 315
revocation of, *4*, 157, 158
trusts during war period, *4*, **484**; *5*, **379**
of residue giving powers of appointment under war conditions, *5*, **379**

WORDS OF LIMITATION,
lack of proper, rectification by Court, *5*, 144

[*Italic figures indicate volume number; black figures indicate Precedents.*]

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602